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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 210

THE PULLMAN COMPANY, H. J. HATCH, EDWARD E. MEYERS AND A. J. KASH, PETITIONERS,

vs.

MRS. GARNETT V. JENKINS AND ROBERT W. JENKINS, BY MRS. GARNETT V. JENKINS, HIS GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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[fol. 1] Names and addresses of attorneys omitted in printing.

[fol. 2] Citation, in usual form, showing service on Robert Brennan et al., omitted in printing.

[fols. 3-4] Affidavit of service of appeal papers omitted in printing.

[fol. 5]

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 393404

MRS. GARNETT V. JENKINS, and ROBERT W. JENKINS, by Mrs. Garnett V. Jenkins, His Guardian ad Litem, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation; THE PULLMAN COMPANY, a Corporation; A. J. Kash, B. A. Hatch, John Doe One and John Doe Two, Defendants

COMPLAINT—Filed September 27, 1935

Damages

(Wrongful Death)

Come Now the plaintiffs, and for a cause of action against the defendants, and each of them, complain and allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California the above named plain-

tiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

[fol. 6]

III

That at all times herein mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended without interruption through the State of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in inter-state commerce between the States of California, Nevada, Arizona and other states.

IV

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the aforesaid States and authorized to do business in the State of California.

V

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a cor-

[fol. 7]

poration, has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment

and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VI

That the said defendant, B. A. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name is not at this time known to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, at all times herein mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name is at this time unknown to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, on the 29th day of March, 1935 and at all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the [fol. 8] 29th day of March, 1935, as will be hereinafter specifically set forth.

VII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States, but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, with the terminal for said Robert L. Jenkins at San Luis Obispo,

California, on train number 75, as plaintiffs are informed and believe and therefore allege, and known as "The Lark", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as such conductor of said train as aforesaid, with his terminal on said day at San Luis Obispo, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment, was called to the Pullman car by the Pullman conductor, defendant B. A. Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, B. A. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to [fol. 9] subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, B. A. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, A. J. Kash, from said train at Ventura, California; that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he struck the said Robert L. Jenkins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which

hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

[fol. 10] VIII

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855 of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, John Doe One, whose name plaintiffs do not at this time know, but who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 negligently, carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to board on said [fol. 11] day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner, using profanity and threatening to enter said passenger station and go in and through

the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agent and employee, John Doe Two, permit the said defendant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor did said defendant, The Pullman Company, by and through its said employee as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

IX

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert [fol. 12] L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

X

That at the time of the injury referred to, the said Robert L. Jenkins, was earning from his said occupation as aforesaid the sum of $221.00 per month; that at the time of the death of the said Robert L. Jenkins, he was fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased, Robert L. Jenkins, had a life expectancy of 70.08 years.

XI

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein, Mrs. Garnett V. Jenkins, who was

wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

XII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, defendants, B. A. Hatch, John Doe One and John Doe Two.

XIII

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of [fol. 13] the said Robert L. Jenkins, deceased, to their damage in the sum of $50,000.00.

For a cause of action against the defendant, A. J. Kash, plaintiffs allege:-

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named, plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purpose of this action.

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the defendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, quarrelsome and boisterous manner [fol. 14] pass through the gates in said passenger station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Francisco, and that said defendant did approach and board The Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without having any permission or fare or ticket to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said loud and unusual tone of voice and tumultuous conduct, threatenings, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor requested the defendant, A. J. Kash, to leave the train, but that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until [fol. 15] said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, de-

ceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk and disorderly as aforesaid, and as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation violently attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which blow caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, [fol. 16] and that the said Robert W. Jenkins is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving and affectionate husband and father, generously providing for the health, comfort and maintenance of his said family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a rail-

road conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of $221.00 per month; that by reason of the said death of said Robert L. Jenkins as hereinabove set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindness, love and affection, to their damage in the sum of $50,000.00.

Wherefore plaintiffs pray judgment as follows:

1. On their first cause of action, againts the defendants, and each of them, for the sum of $50,000.00;

2. On their second cause of action, against the defendant, A. J. Kash, for the sum of $50,000.00;

3. For their costs herein expended, and

[fol. 17] 4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Duly sworn to by Mrs. G. V. Jenkins. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 18] In Superior Court of Los Angeles County

[Title omitted]

Amended Complaint—Filed November 25, 1935

Come Now the plaintiffs and file their amended complaint herein and for cause of action against the defendants, and each of them, complain and allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

[fol. 19]

III

That at all times herein mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended without interruption through the States of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in interstate commerce between the States of California, Nevada, Arizona and other states, and was engaged in inter-state commerce as aforesaid on the 29th day of March, 1935.

IV

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the aforesaid States and authorized to do business in the State of California.

[fol. 20]

V

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a

corporation, has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VI

That the said defendant, H. J. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name is not at this time known to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, at all times herein mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name is at this time unknown to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, on the 29th day of March, 1935 and at all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to [fol. 21] said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the 29th day of March, 1935, as will be hereinafter specifically set forth.

VII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States,

but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, said defendant, Southern Pacific Company, being engaged on said 29th day of March, 1935 in inter-state commerce as aforesaid, with the terminal for said Robert L. Jenkins at San Luis Obispo, California, on train number 75, as plaintiffs are informed and believe and therefore allege, and known as "The Lark", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as such conductor of said train as aforesaid, with his terminal on said day at San Luis Obisno, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment, was called to the Pullman car by the Pullman conductor, defendant H. J. [fol. 22] Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, H. J. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, malicious, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, H. J. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, H. J. Kash, from said train at Ventura, California; that just as said

defendant, H. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of [fol. 23] the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

VIII

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855 of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, John Doe One, whose name plaintiffs do not at this time know, but who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 [fol. 24] negligently carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to

board said train on said day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said train, "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner using profanity and threatening to enter said passenger station and go in and through the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agent and employee, John Doe Two, permit the said defendant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor did said defendant, The Pullman Company, by and through its said employees as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

[fol. 25]

IX

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

X

That at the time of the injury referred to, the said Robert L. Jenkins was earning from his said occupation as aforesaid the sum of $221.00 per month; that at the time of the death of the said Robert L. Jenkins he was

fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased Robert L. Jenkins, had a life expectancy of 70.08 years.

XI

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein Mrs. Garnett V. Jenkins, who was wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

XII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, H. J. Hatch, John Doe One and John Doe Two.

XIII

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, [fol. 26] Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of the said Robert L. Jenkins, deceased, to their damage in the sum of $50,000.00.

XIV

That the plaintiffs bring this action as against the defendant, Southern Pacific Company, a corporation, under and by virtue of Chapter 2, Section 51, Title 45 of the United States Codes, which provides, among other things, that every common carrier by railroad while engaged in commerce between any of the several States or Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow and children of such employee, for such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier.

For a cause of action against the defendant, A. J. Kash, plaintiffs allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purpose of his action.

[fol. 27]

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the defendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, malicious, quarrelsome and boisterous manner pass through the gates in said passenger station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, as these plaintiffs are informed and believe and therefore allege, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Fran-

cisco, and that said defendant did approach and board the Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without having any permission or fare or ticket, as plaintiffs are informed and believe and therefore allege, to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said [fol. 28] loud, malicious and unusual tone of voice and tumultuous conduct, threatening, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and, as plaintiffs are informed and believe and therefore allege, did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor requested the defendant, A. J. Kash, to leave the train, but that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, deceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California, to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California, the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as [fol. 29] aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk a..d disorderly as aforesaid, and

as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation, violently, wilfully and maliciously attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which blow caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, and that the said Robert W. Jenkins, plaintiff herein, is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving, and affectionate husband and father, generously providing for the health, comfort and maintenance of his said family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a railroad conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did [fol. 30] on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of $221.00 per month; that said striking of the husband of plaintiff, Mrs. Garnett V. Jenkins, and father of plaintiff, Robert W. Jenkins, the said Robert L. Jenkins, deceased, by the defendant, A. J. Kash, which caused his injury and death, was wilful and malicious and against the will of said deceased, Robert L. Jenkins; that by reason of the said death of said Robert L. Jenkins as hereinabove

set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindless, love and affection, to their damage in the sum of $50,000.00.

Wherefore plaintiffs pray judgment as follows:

1. On their first cause of action, against the defendants, and each of them, for the sum of $50,000.00;

2. On their second cause of action, against the defendant, A. J. Kash, for the sum of $50,000.00.

3. For their costs herein expended; and

4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Verified.

[File endorsement omitted.]

[fol. 31] In Superior Court of Los Angeles County

[Title omitted]

Notice of Motion for Removal—Filed November 20, 1935

To the Plaintiffs above named; and to L. H. Phillips, Esq., Their Attorney:

You and Each of You will please take notice that on Monday, November 25, 1935, at 10:00 o'clock A. M. thereof, or as soon thereafter as counsel can be heard, The Pullman Company, a corporation, defendant in the above entitled action, will present to the Superior Court of the State of California in and for the County of Los Angeles, Department 35 thereof, at the City Hall in the City of Los Angeles, said County and State, its petition for and bond on removal of the above entitled action in the above entitled court to the District Court of the United States for the Southern District of California, Central Division, pursuant to the [fol. 32] statutes in such cases made and provided; and that a copy of said petition and a copy of said bond, together

with a copy of the proposed order of removal are hereunto annexed and made a part hereof.

Dated November 20, 1935.

Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for The Pullman Company.

Received copy of the within Notice of Removal this 20 day of Nov. 1935.

L. H. Phillips, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 33] In Superior Court of Los Angeles County

[Title omitted]

Petition for Removal—Filed November 20, 1935

Comes Now The Pullman Company, a corporation, and presents this its petition for the removal of the above entitled cause to the District Court of the United States, for the Southern District of California, Central Division, and in that behalf respectfully shows:

I

That The Pullman Company, a corporation, is defendant in the above entitled action. That at the time of the commencement of said action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, in said State, and that it is not now and was not at the time of the commencement of this action and never has been a corporation organized and existing under and by virtue of the laws of the State of California. That it was at all of said times and that it is now a citizen and resident of the State of Illinois, and that it is not now and [fol. 34] was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of the State of Illinois, and a non-resident of the State of California.

II

That Mrs. Garnett V. Jenkins, and Robert W. Jenkins by Mrs. Garnett V. Jenkins his Guardian ad litem, plaintiffs in the above entitled action, were at the time of the commencement of said action and ever since have been and now are citizens and residents of the State of California, and that said plaintiffs were not at any of the said times and are not now citizens or residents of the State of Illinois, but at all of said times plaintiffs were and now are non-residents of the State of Illinois.

III

That the above entitled action is a suit of a civil nature brought by plaintiffs to obtain a judgment against your petitioner for the sum of $100,000.00 as damages alleged to have been sustained by plaintiffs on account of the death of Robert L. Jenkins on or about March 29, 1935, while working as a passenger conductor on a railroad train operating between Los Angeles and San Francisco, California.

IV

That the complaint in said action was filed on or about the 27th day of September, 1935, and was served upon your petitioner on or about October 29, 1935, in San Francisco, California. That according to the laws of the State of California, the time within which your petitioner is required to appear, answer, demur or otherwise plead to said action has not yet expired, and your petitioner has not [fol. 35] answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V

That the amount in controversy in the above entitled action exceeds exclusive of interest and costs the sum and value of $3,000.

VI

That this is a suit in which there is a separable controversy between citizens of different states, and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

VII

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will within thirty (30) days from the filing of this petition enter a certified copy of the record in the above entitled cause in the United States District Court, for the Southern District of California, Central Division, and that your petitioner will pay all costs that are awarded by the said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this Court accept this petition and said bond and surety, and that said action be removed into said District Court of the United States, for the Southern District of California, Central Division, pursuant to the statutes in such cases made and provided, and that this Court proceed no further in this action, except [fol. 36] to make the Order of Removal as prayed for, accept and approve the Bond presented herewith, and direct the Clerk of this Court to prepare a certified copy of the record in the above entitled action for entry in the said District Court of the United States, for the Southern District of California, Central Division.

And your petitioner will ever pray, etc.

November 20, 1935.

The Pullman Company, a Corporation, by Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for Petitioner.

Verified.

Received copy of the within Petition for Removal this 20 day of Nov. 1935.

L. H. Phillips, Attorney for Plaintiffs. B.

[File endorsement omitted.]

[fols. 37-39] Bond on removal for $500.00, approved and filed November 20, 1935, omitted in printing.

[fol. 40] In Superior Court of Los Angeles County

[Title omitted]

Order Granting Petition for Removal—November 25, 1935

Petition and Bond on removal to the United States District Court in and for the Southern District of California, Central Division of defendant Pullman Company come on for hearing, L. H. Phillips appearing as attorney for plaintiff and Brennan, Sievert and Lockwood for defendants; said petition is granted and bond approved.

[fol. 41] In Superior Court of Los Angeles County

[Title omitted]

Order of Removal—Filed November 25, 1935

The Pullman Company, a corporation, defendant in the above named action, having, within the time provided by law, filed its petition in due form for the removal of said action to the District Court of the United States for the Southern District of California, Central Division, and having at the same time offered a good and sufficient Bond, as required by law, and said Bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States for the Southern District of California, Central Division:

Now, Therefore, it is Hereby Ordered that said action be removed into the District Court of the United States for [fol. 42] the Southern District of California, Central Division, and that all further proceedings in this Court in said action be and they are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in said United States District Court.

Done this 25th day of November, 1935.

Robert W. Kenny, Judge.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ANSWER TO COMPLAINT—Filed December 16, 1935

Now Comes Defendant A. J. Kash and answering the first count of the complaint herein, denies and alleges:

I

Alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, X, XI and XII of said first cause of action (except as hereinafter specifically denied), and basing his denial on said ground denies each and all of the allegations of said paragraphs.

[fol. 44] II

Denies that this defendant was at any time causing a disturbance in any Pullman sleeping car and denies that this defendant was in any such car in an intoxicated condition and that his conduct was unruly, objectionable, tumultuous, offensive, threatening, quarrelling, or challenging to fight. Denies that this defendant used vulgar, profane, or indecent language in the presence or hearing of women passengers in said car or otherwise, or in a loud or boisterous manner, and denies that this defendant made himself objectionable to and annoyed other passengers in said Pullman car. Denies that Robert L. Jenkins or B. A. Hatch requested defendant to cease any objectionable conduct and that said defendant continued any objectionable or loathsome conduct. Denies that it was necessary for said Jenkins to call any police to assist in ejecting this defendant from any train. Denies that as this defendant was being taken from said train, or at any time, he struck said Jenkins a terrific or any blow on his head. Denies that any such blow injured said Jenkins or affected his brain or caused hemorrhage of the right frontal lobe of his brain or subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, or elsewhere, and denies that said Jenkins died as the result of any act of this defendant on April 19th or at any time. Denied that this defendant was in an intoxicated condition or conducting himself in a loud or boisterous manner or using profanity

or was in a drunken condition or was acting in a disorderly, boisterous, or threatening manner, as alleged in said complaint.

[fol. 45] III

Denies all of the allegations of paragraph IX of said first cause of action. Denies all of the allegations of paragraph XIII of said first cause of action and particularly denies that by reason of any act or neglect of this defendant plaintiffs or any of them have been damaged in the sum of $50,000.00 or any sum.

And answering the second cause of action of plaintiffs' complaint, defendant denies and alleges as follows:

I

Alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations of paragraphs I, II, III, V, and VI of said second cause of action (except as hereinafter expressly admitted or denied), and basing his denial on said ground, denies each and all of the allegations contained in said paragraphs excepting such as are hereinafter admitted or denied.

II

Admits that this defendant has been and now is a resident of the State of California.

III

Denies that any attack upon Robert W. Jenkins by this defendant was unlawful. Denies by reason of any act of this defendant plaintiffs have been damaged in the sum of $50,000.00 or any sum at all.

[fol. 46] IV

Denies all of the allegations of paragraph IV excepting the allegation that a train known as "The Lark" travels between Los Angeles and San Francisco and admits said allegation.

As a further and separate defense to each of the causes of action of said complaint, this defendant alleges that if this defendant at any time struck Robert W. Jenkins, then he did so in self-defense and in the reasonable belief that

it was necessary for him to do so to protect himself against harm and injury.

Wherefore this defendant prays that plaintiffs take nothing by their complaint and that he be hence dismissed with his costs herein incurred.

Livingston & Livingston, Attorneys for Defendant A. J. Kash.

Verified.

[File endorsement omitted.]

[fol. 47] In United States District Court, Southern District of California, Central Division

Mrs. Garrett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, His Guardian ad Litem, Plaintiffs,

vs.

Southern Pacific Company, a Corporation; The Pullman Company, a Corporation, et al., Defendants

Stipulation re Substitution—Filed December 27, 1935

It is Hereby Stipulated by and between plaintiffs and the defendants, The Pullman Company and H. J. Hatch, through their respective counsel, that Mrs. Garnett V. Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, may be substituted as party plaintiff in the above entitled cause in the place and stead of Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem.

Dated this 16th day of December, 1935.

L. H. Phillips, Attorney for Plaintiffs. Robert Bren-
[fol. 48] nan, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company. Robert Brennan & M. W. Reed, Attorney for Defendant, H. J. Hatch.

Order

Pursuant to the above stipulation, and good cause appearing therefor,

It is Hereby Ordered that Mrs. Garnett V. Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, be and is hereby substituted as party plaintiff in the above entitled cause.

Dated this 27th day of December, 1935.

Leon R. Yankwich, Judge.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

DEMURRER OF H. J. HATCH—Filed January 17, 1936

Comes Now H. J. Hatch, one of the defendants hereinabove named, and demurs to the amended complaint on file herein on the ground that the same does not state facts sufficient to constitute a cause of action against him.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated, January 17, 1936.

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Sections 430 and 431 Code of Civil Procedure of the State of California.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND TO STATE COURT—Filed January 22, 1936

To the Pullman Company, H. J. Hatch and Edward E. Myers, and to Robert Brennan, M. W. Reed, Leo E. Sievert and H. K. Lockwood, Their Attorneys:

Now Comes the plaintiffs in the above entitled cause and moves this court to remand the above entitled cause to the Superior Court of the State of California in and for the County of Los Angeles on the grounds that this court is without jurisdiction to hear and determine the cause, particularly in that:

(a) That the above entitled cause and action is not a controversy wholly between citizens of different states.

(b) That the defendants, H. J. Hatch and Edward E. Myers, are now and at all times referred to in the above entitled action residents of the County of Los Angeles, State of California, and citizens of the State of California.

(c) That the defendant, Edward E. Myers, sued herein as John Doe One, has heretofore, to-wit: on or about the 14th day of January, 1936, been served with summons and complaint in the City of Los Angeles, County of Los Angeles, State of California; that said defendant, Edward E. Myers, was sued in the above entitled action in the Superior Court of the State of California in and for the County of Los Angeles, which action therein is numbered 393404.

(d) That the action against the above named defendants is not a separable controversy but that all of the defendants are jointly responsible and liable;

[fol. 51] (e) That the defendant, The Pullman Company, a corporation, heretofore filed its petition for removal of the above entitled case in the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court, which said petition was heard by the Honorable Robert W. Kenny, as judge of said Superior Court, and was on the 25th day of November, 1935 granted by the said Superior Court.

(f) That the petition seeking the removal of the above entitled action from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court was based upon the ground set forth in said petition, to-wit: that the above entitled action is a controversy between citizens of different states and a separable controversy as between the plaintiffs and defendant, The Pullman Company.

(g) That the petition for removal of the above entitled cause from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court was not joined in by all of the parties defendant or consented to by plaintiffs, but the motion based upon said petition for removal was opposed by plaintiffs and granted by the said Superior Court.

(h) That none of the defendants in the above entitled action were included or complained against for the sole or any purpose to prevent the removal of the case at bar from the State to the Federal Court.

(i) That the original jurisdiction of the above entitled action was and is in the Superior Court of the State of California in and for the County of Los Angeles.

(j) That the liability of the defendant is joint and several and sufficiently pleaded; that the complaint in the case [fol. 52] at bar is an action against the defendants as joint tort feasors.

(k) That the bond for removal submitted by the defendant, The Pullman Company, now on record in the Superior Court of the State of California in and for the County of Los Angeles is not sufficient, legal or valid, or in conformity with the statutes in such cases made and provided, particularly in that said bond on removal and the application thereof on the part of National Surety Corporation, a corporation, as surety does not include all of or refer to all of the defendants, Edward E. Myers and H. J. Hatch not being mentioned or referred to in said bond on removal.

(l) That the original records and files in the case at bar are now, and have been at all times since the commencement of the above entitled action in the Superior Court of the State of California in and for the County of Los Angeles on file in said Superior Court, and that there has been filed in the above entitled court a certified copy of said original files.

(m) That none of the defendants have filed any answer or pleading in the District Court of the United States, Southern District of California, Central Division, up to and including the time of the making of this motion to remand, except the defendant, The Pullman Company, and that the defendant, H. J. Hatch, filed a demurrer to plaintiffs' amended complaint.

That plaintiff has been obliged to and has incurred court costs and attorney's fees in the matter of presenting this [fol. 53] motion to remand and remove the above entitled action from the above entitled court to the Superior Court of the State of California in and for the County of Los

Angeles; and that the defendant, The Pullman Company, a corporation, has filed its bonds in said Superior Court to indemnify the plaintiffs for all costs by them expended in the event that the above entitled action was wrongfully removed from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court.

Wherefore Plaintiffs Pray:

1. That this motion to remand to the Superior Court of the State of California in and for the County of Los Angeles be granted.

2. That the plaintiffs be awarded all their court costs and attorney's fees by them incurred or expended and which plaintiffs pray this court against the defendant, The Pullman Company.

3. For such other and further relief as may seem meet, just and equitable in the premises.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 54] In United States District Court

[Title omitted]

Order Sustaining Demurrer—January 29, 1936

This cause having been argued and submitted for decision upon the demurrer of H. J. Hatch to the Complaint, it is by the Court ordered that the demurrer is sustained, and plaintiff is allowed ten days in which to amend the complaint.

[fol. 55] In United States District Court

Second Amended Complaint—Filed February 8, 1936

Come Now the plaintiffs and file their second amended complaint, and for cause of action against the defendants, and each of them, allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

III

That on the 10th day of December, 1935 the Superior Court of the State of California in and for the County of Los Angeles, upon application, did appoint Mrs. Garnett V. Jenkins administratrix of the Estate of Robert L. Jenkins, Deceased, and the said administratrix qualified as such administratrix on the 10th day of December, 1935 and ever since and is now the duly appointed, qualified and acting administratrix of the Estate of Robert L. Jenkins, deceased; that upon the 27th day of December, 1935, upon stipulation of counsel and order of the Superior Court of the State of California in and for the County of Los Angeles the said Mrs. Garnett V. Jenkins, as administratrix [fol. 56] of the Estate of Robert L. Jenkins, Deceased was substituted as party plaintiff in place and stead of Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad Litem.

IV

That at all times herein mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended

without interruption through the States of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in inter-state commerce between the States of California, Nevada, Arizona and other states, and was engaged in inter-state commerce as aforesaid on the 29th day of March, 1935.

V

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the [fol. 57] aforesaid States and authorized to do business in the State of California.

VI

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a corporation, has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VII

That the said defendant, H. J. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name plaintiffs have learned since the filing of this cause to be Edward E. Myers, and plaintiffs therefore ask leave of court to amend said complaint showing said true name of John Doe One as aforesaid; that said defendant Edward H. Myers, sued herein as John Doe One, at all times herein

mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name plaintiffs have learned since the filing of this cause to be Fred M. Dolsen, and plaintiffs therefore ask leave of court to amend said complaint showing said true name of John Doe Two as aforesaid, on the 29th day of March, 1935 and at [fol. 58] all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the 29th day of March, 1935, as will be hereinafter specifically set forth.

VIII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States, but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, said defendant, Southern Pacific Company, being engaged on said 29th day of March, 1935 in interstate commerce as aforesaid, with the terminal for said Robert L. Jenkins at San Luis O[illegible]spo, California, on train number 75, as plaintiffs are inf[illegible]med and believe and therefore allege, and known as "The [illegible]rk", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as [fol. 59] such conductor of said train as aforesaid, with his terminal on said day at San Luis Obispo, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment,

was called to the Pullman car by the Pullman conductor, defendant H. J. Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, H. J. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, malicious, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, H. J. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, H. J. Kash, from said train at Ventura, California; that just as said defendant, H. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jen-
[fol. 60] kins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

IX

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855

of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, Fred M. Dolsen, sued herein as John Doe Two, whose name plaintiffs have [fol. 61] learned since the filing of said complaint to be Fred M. Dolsen, as aforesaid, who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 negligently, carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to board said train on said day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said train, "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner, using profanity and threatening to enter said passenger station and go in and through the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agents and employees, Edward E. Myers, sued herein as John Doe One, and the said H. J. Hatch, defendant herein, permit the said defend-

ant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor [fol. 62] did said defendant, The Pullman Company, by and through its said employees as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

X

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

XI

That at the time of the injury referred to, the said Robert L. Jenkins was earning from his said occupation as aforesaid the sum of $221.00 per month; that at the time of the death of the said Robert L. Jenkins he was fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased, Robert L. Jenkins, had a life expectancy of 70.08 years.

XII

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein Mrs. Garnett V. Jenkins, who was wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

[fol. 63]

XIII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, H. J. Hatch, Edward E. Myers, sued herein as John Doe One, and Fred M. Dolsen, sued here as John Doe Two.

XIV

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of the said Robert L. Jenkins, deceased, to their damage in the sum of $50,000.00.

XV

That the plaintiffs bring this action as against the defendant, Southern Pacific Company, a corporation, under and by virtue of Chapter 2, Section 51, Title 45 of the United States Codes, which provides, among other things, that every common carrier by railroad while engaged in commerce between any of the several States or Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow and children of such employee, for such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier.

[fol. 64] For a cause of action against the defendant, A. J. Kash, plaintiffs allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purposes of this action.

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the de-

fendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, malicious, quarrelsome and boisterous manner pass through the gates in said passenger [fol. 65] station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, as these plaintiffs are informed and believe and therefore allege, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Francisco, and that said defendant did approach and board the Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without any permission or fare or ticket, as plaintiffs are informed and believe and therefore allege, to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said loud, malicious and unusual tone of voice and tumultuous conduct, threatening, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and, as plaintiffs are informed and believe and therefore allege did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor

requested the defendant, A. J. Kash, to leave the train, but [fol. 66] that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, deceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California, to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California, the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk and disorderly as aforesaid, and as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation, violently, wilfully and malicious- attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage [fol. 67] took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, and that said Robert W. Jenkins, plaintiff herein, is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior

thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving and affectionate husband and father, generously providing for the health, comfort and maintenance of his family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a railroad conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of $221.00 per month; that said striking of the husband of plaintiff, Mrs. Garnett V. Jenkins, and father of plaintiff, Robert W. Jenkins, the said Robert L. Jenkins, [fol. 68] deceased, by the defendant, A. J. Kash, which caused his injury and death, was wilful and malicious and against the will of said deceased, Robert L. Jenkins; that by reason of the said death of said Robert L. Jenkins as hereinabove set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindness, love and affection, to their damage in the sum of $50,000.00.

Wherefore Plaintiffs Pray Judgment as follows:

1. On their first cause of action, against the defendants, and each of them, for the sum of $50,000.00;

2. On their second cause of action, against the defendant, A. J. Kash, for the sum of $50,000.00;

3. For their costs herein expended; and

4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Verified.

[File endorsement omitted.]

[fol. 69] In United States District Court

[Title omitted]

Order Denying Motion to Remand—February 19, 1936

This cause having been heard and submitted for decision upon the motion of the plaintiffs to remand to the Superior

Court of the State of California in and for the County of Los Angeles and having been considered, it is by the Court ordered that the motion to remand be and the same is hereby denied.

[fol. 70] In United States District Court

Notice of Order—Filed February 21, 1936

To the Plaintiffs Above Named, and to L. H. Phillips, Esq. Their Attorney:

You and Each of You will please take notice that an order was entered on the 19th day of February, 1936, denying the plaintiffs' motion to remand the above entitled cause to the state court.

Dated Los Angeles, February 21, 1936.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for The Pullman Company.

[File endorsement omitted.]

[fol. 71] In United States District Court

Answer of The Pullman Company to the Second Amended Complaint—Filed February 25, 1936

Comes Now The Pullman Company, one of the defendants hereinabove named, and for its separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication, if such be intended, therein, that it owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph mentioned, or elsewhere, or at all, and specifically denies that this defendant is a common carrier of passengers for hire, or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the [fol. 72] right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935," and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof.

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that it has not sufficient information or belief to enable it to answer the allegations thereof and basing its denial thereon, denies the same.

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that it has not sufficient information or belief to enable it to answer the allegations thereof and basing its denial thereon, denies the same.

[fol. 73] VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that it have and recover its necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Dated, February 24th, 1936.

Verified.

[File endorsement omitted.]

[fol. 74] In Superior Court of Los Angeles County

[Title omitted]

Request for Transcript—Filed March 6, 1936

To L. E. Lampton, County Clerk, and Clerk of the Above Entitled Court:

You are hereby requested to prepare a transcript of the hereinafter specifically described documents in the above entitled action, to-wit:

1. Stipulation between counsel for plaintiffs and counsel for defendant, Southern Pacific Company, a corporation, that Mrs. Garnett V. Jenkins, Administratrix, be substituted as party plaintiff in the above entitled cause.

[fol. 75] 2. Answer of the defendant, Southern Pacific Company.

3. Amendment to the complaint, inserting the true name of John Doe One as Edward E. Myers.

4. Affidavit of Service on A. J. Kash.

5. Certification of service by Sheriff of San Francisco on The Pullman Company.

6. Original Summons.

7. Answer of Fred M. Dolsen, sued herein as John Doe One.

Dated This 5th day of March, 1936.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 76] In Superior Court of Los Angeles County

[Title omitted]

Summons—Filed June 27, 1936

The People of the State of California Send Greetings to Southern Pacific Company, a Corporation; The Pullman Company, a Corporation; A. J. Kash, B. A. Hatch, John Doe One and John Doe Two, Defendant-:

You are directed to appear in an action brought against you by the above named plaintiffs in the Superior Court of the State of California, in and for the County of Los An-
[fol. 77] geles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 27 day of September, 1935.

L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by W. L. Greene, Deputy. (Seal Superior Court, Los Angeles County.)

Notice

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

[fol. 78] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Daniel W. May being sworn, says: I am and was at the time of the service of the summons herein, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles, ——, State of California, ——, at the address and the time set opposite their names, a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Name of Defendants Served Edward E. Myers, sued herein as John Doe One City and Street Address 649 East 56th Street Los Angeles, Calif. Date of Service January 14, 1936.

My fees for services are, $.50 for 10 miles actually traveled at 25 cents per mile, $2.50. Total, $3.00.

(Signed) Daniel W. May.

Subscribed and sworn to before me this 14th day of January, 1936. L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by —— ——, Deputy. L. H. Phillips, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[Sheriff's Office. Received via U. S. Mail Oct. 21, 1935. At 9:25 o'clock A. M., San Francisco, California.]

[fol. 79] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Daniel W. May being sworn, says: I am and was at the time of the service of the summons herein, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles,

—, State of California, —— at the address and the time set opposite their names, a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Name of Defendants Served Fred Dolsen, sued herein as John Doe Two. City and Street Address Southern Pacific Railway Station, Fifth and Central Streets, Los Angeles, California. Date of Service Jan. 22, 1936.

My fees for services are $.50 for 7 miles actually traveled at 25 cents per mile, $1.75. Total, $2.25.

(Signed) Daniel W. May.

Subscribed and sworn to before me this 23rd day of January, 1936. L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by —— ——, Deputy. L. H. Phillips, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF EDWARD E. MYERS, SUED HEREIN AS JOHN DOE ONE, TO THE SECOND AMENDED COMPLAINT—Filed March 17, 1936

Comes Now Edward E. Myers, sued herein as John Doe One, and for his separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication therein, if such be intended, that the Pullman Company, one of the defendants herein, owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph [fol. 81] mentioned, or elsewhere, or at all, and specifically

denies that said defendant is a common carrier of passengers for hire or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935", and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof.

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

[fol. 82]

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that he have and recover his necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Attorneys for Defendant Edward E. Myers (sued herein as John Doe One).

Dated March 17th, 1936.

Verified.

[File endorsement omitted.]

[fol. 83] IN UNITED STATES DISTRICT COURT

ANSWER OF H. J. HATCH TO THE SECOND AMENDED COMPLAINT—Filed March 17, 1936

Comes Now H. J. Hatch, one of the defendants hereinabove named, and for his separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication therein, if such be intended, that the Pullman Company, one of the defendants herein, owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph mentioned, or elsewhere, or at all, and specifically denies that said defendant is a common carrier of passengers for hire or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said

defendant, A. J. Kash. was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the [fol. 84] said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935," and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof.

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

[fol. 85]

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that he have and recover his necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated March 17th, 1936.

Verified.

[File endorsement omitted.]

[fol. 86] In Superior Court of Los Angeles County

[Title omitted]

Order as to Record—Filed March 6, 1936

Pursuant to the stipulation between counsel for plaintiffs and the defendants in the above entitled cause, and good cause appearing therefor,

It is Hereby Ordered that those records which were not heretofore transcribed on removal of the above entitled cause to the United States District Court, Southern District of California, Central Division, be transcribed and removed to the District Court of the United States, Southern District of California, Central Division and the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles is hereby ordered to prepare a transcript of the following documents for removal to the Federal Court as aforesaid, to-wit:

1. Stipulation between counsel for plaintiffs and counsel for defendant, Southern Pacific Company, a corporation, that Mrs. Garnett V. Jenkins, Administratrix, be substi-
[fol. 87] tuted as party plaintiff in the above entitled cause.
2. Answer of the defendant, Southern Pacific Company.
3. Amendment to the complaint, inserting the true name of John Doe One as Edward E. Myers.
4. Affidavit of Service on A. J. Kash.
5. Certification of service by Sheriff of San Francisco on The Pullman Company.
6. Original Summons.
7. Answer of Fred M. Dolsen, sued herein as John Doe One.

The Clerk of this Court is hereby directed to make a certified copy of the record hereinabove set forth to be transcribed in said action for entry in said District Court of the United States, Southern District of California, Central Division.

Done in open court this 6th day of March, 1936.
K. K.

Edmonds Presiding Judge. (Seal)

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 88] In United States District Court

Answer of Defendants Southern Pacific Company and Fred M. Dolsen, Sued Herein as John Doe Two, to Plaintiffs' Second Amended Complaint—Filed December 4, 1936

Defendants Southern Pacific Company, a corporation, and Fred M. Dolsen, sued herein as John Doe Two, answering plaintiffs' second amended complaint for themselves alone, and not for any other defendant, admit, deny and allege as follows:

I

Admit the allegations of paragraph I.

II

Admit the allegations of paragraph II.

III

Admit the allegations of paragraph III.

IV

Answering paragraph IV, admit that Southern Pacific Company was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of railroad tracks and equipment. Admit said company operated

trains through California, Nevada, Arizona and other states, and that said equipment and passenger trains are indiscriminately used by defendant for interstate and intrastate commerce, and admit that at all times mentioned in plaintiffs' complaint, defendant engaged as a common carrier and engaged in interstate commerce between the States [fol. 89] of California, Nevada, Arizona and other states, and was so engaged in interstate commerce as aforesaid on the 29th day of March, 1935.

Further answering said paragraph these defendants deny each and every allegation therein contained, both generally and specially, except as heretofore expressly admitted.

V

Answering paragraph VI, these defendants admit the allegations contained therein.

VI

Answering paragraph VII, these defendants have not sufficient information or belief to enable them to answer, and basing their denial on that ground, denies each and every allegation therein contained, both generally and specially, except that defendants admit that defendant A. J. Kash at all times mentioned was a passenger on said Pullman car on the 29th day of March, 1935.

VII

Admit the allegations of paragraph VIII.

VIII

Answering paragraph IX, these defendants admit that in the event persons are disorderly in and about said passenger coaches, that the conductor or other officer in charge shall eject said passenger or passengers from the train, and are permitted to call to their assistance duly constituted peace officers of the State, City or County of or in California; further admit that the employees of defendant Southern Pacific Company are instructed to preserve order in and about stations and station platforms. [fol. 90] Further answering said paragraph, these defendants deny each and every allegation therein contained, both generally and specially, except as heretofore expressly admitted.

IX

Answering paragraph X, these defendants deny each and every allegation therein contained, both generally and specially.

X

Admit the allegations contained in paragraph XI, excepting these defendants deny that Robert L. Jenkins had a life expectancy of 70.08 years.

XI

Answering paragraph XII, these defendants have not sufficient information or belief to enable them to answer, and basing their denial on that ground deny each and every allegation therein contained, both generally and specially.

XII

Answering paragraph XIII, these defendants deny each and every allegation therein contained, both generally and specially.

XIII

Answering paragraph XIV, these defendants deny each and every allegation therein contained, both generally and specially, and further deny said plaintiffs have been damaged in the sum of $50,000.00, or any other sum, or at all.

XIV

Admit the allegations of paragraph XV.

[fol. 91] Defendants Southern Pacific Company and Fred M. Dolsen, voluntarily appearing as to the second cause of action in said complaint, for the sole purpose of making certain denials with respect to particular allegations therein, admit, deny and allege as follows:

I

Admit the allegations of paragraph I.

II

Admit the allegations of paragraph II.

III

Admit the allegations of paragraph III.

IV

Answering paragraph IV, these defendants deny each and every allegation therein contained, both generally and specially, excepting admit that while on said train defendant A. J. Kash, while in said Pullman car, did loudly, maliciously, and with unusual tone of voice and with tumult-ous conduct, threaten, quarrel and challenge to fight passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; further admit that the said conductor, for purposes of ejecting defendant A. J. Kash, called police officers at Ventura, California; that upon arriving in Ventura, the said A. J. Kash was placed under arrest by the [fol. 92] said officer. Further admit that the said Robert L. Jenkins died on the 19th of April, 1935.

V

Admit the allegations of paragraph V.

VI

Answering paragraph VI, these defendants deny each and every allegation therein contained, both generally and specially, and further deny said plaintiffs have been damaged in the sum of $50,000.00, or any other sum, or at all.

Further answering, and as a first separate and affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof, these defendants allege as follows:

I

That the rights of the decedent, Robert L. Jenkins, and defendant Southern Pacific Company, at the time of said alleged injury, were governed by the provisions of the Federal Employers Liability Act, and that said alleged injury, if any, arose in the course of decedent's employment, and from the ordinary risks and hazards attendant upon such employment, and of extraordinary risks and hazards which arose during the course of the employment,

of which decedent knew, or in the exercise of ordinary care should have known.

[fol. 93] For a further, separate and second affirmative defense to all and singular the purported causes of action of the plaintiff's second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, decedent himself was engaged in the employment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that the rights and liabilities of decedent and said defendant at said times were and are governed by the Federal Employers Liability Act; that said accident, if any, which occurred, and said injury, if any, which was sustained by said decedent as a result thereof, arose directly from and out of the risks, dangers and hazards ordinarily incident to and attendant with and upon the employment of said decedent, and that said risks, hazards and dangers were ordinarily incident to and a part of said defendant Southern Pacific Company's employment, and were therefore assumed by him while engaged in the service of said defendant.

For a further, separate and third affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, said decedent himself was engaged in the em-
[fol. 94] ployment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that the rights and liabilities of decedent and said defendant were and are governed by the Federal Employers Liability Act; that the negligence, if any, on the part of said defendant which resulted in injuries, if any, to said decedent, at all times was open and obvious, and was fully known and appreciated by said decedent, and as a result decedent's said knowledge and appreciation of said danger,

risk and hazard attendant to his said employment, in the face of said dangers, risks and hazards, said decedent thereby assumed the dangers, risks and hazards of the said negligence of said defendant, if any, and of the said injury, if any, as a result thereof and as a result of his said employment.

For a further, separate and fourth affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, decedent himself was engaged in the employment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that said rights and liabilities of decedent and said defendant [fol. 95] at said times were and are governed by the Federal Employers Liability Act; that the injuries of said decedent, if any, arose directly out of and were caused from risks and dangers incident to said employment, which decedent then and there assumed under and by virtue of said Federal Employers Liability Act, whether said risks and dangers were ordinary risks and dangers, ordinarily incident to his employment, or were extraordinary risks and dangers, of which said decedent knew, or in the exercise of reasonable care should have known, but either of which he then and there assumed at the time he entered into the employment of said defendant.

Wherefore, these answering defendants pray that plaintiffs take nothing by their second amended complaint; that they be dismissed hence with their costs; for such other and further relief as the court shall deem meet in the premises.

W. I. Gilbert, Attorney for said Answering Defts.

Verified.

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT

DISMISSAL—Filed December 28, 1936

To the Clerk of the United States District Court, Southern District of California, Central Division:

You will enter the dismissal of the above entitled action as against the defendants, Southern Pacific Company and Fred M. Dolsen.

Dated this 24th day of December, 1936.

L. H. Phillips, Attorney for Plaintiffs.

Approved. W. I. Gilbert, by Thos. P. Cruce, Atty. for Sou. Pac. Co.

It is so ordered Dec. 28, 1936. Leon R. Yankwich, Judge.

Judgment entered and recorded Dec. 28, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

(No. 7421 Y Jenkins vs. Pulman Co. et al. Defts. Exhibit No. B on plea in Bar. Filed 12/29, 1936. R. S. Zimmerman, Clerk, by L. J. S., Deputy Clerk.)

[File endorsement omitted.]

[fol. 97] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF DEFENDANT A. J. KASH—Filed December 29, 1936

Comes Now A. J. Kash, one of the defendants hereinabove named, and, by leave of court duly had, files this his supplemental answer to the complaint on file herein and alleges:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the defendants Southern Pacific Company and Fred M. Dolsen have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendants has been compromised and settled and said defendants released from all

claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

III

That this action has been voluntarily dismissed as to defendants Southern Pacific Company and Fred M. Dolson [fol. 98] by plaintiffs for a valuable consideration, to-wit, the sum of Twenty-five Hundred Dollars ($2500.00), and said dismissal has released all defendants herein.

IV

That plaintiffs have been paid the sum of Twenty-five Hundred Dollars ($2500.00) as compensation for the death of Robert W. Jenkins by defendants Southern Pacific Company and Dolson and in consideration of said payment plaintiffs voluntarily dismissed this action.

Wherefore, this defendant prays that this action be dismissed and that this defendant have judgment for his costs.

Livingston & Livingston, Attorneys for Defendant A. J. Kash.

Verified.

[File endorsement omitted.]

[fol. 99] In United States District Court

Supplemental Answer of the Pullman Company—Filed Dec. 29, 1936

Comes Now The Pullman Company, one of the defendants hereinabove named, and, by leave of court duly had, files this its supplemental answer to the complaint on file herein and by it shows:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the

Southern Pacific Company, one of the defendants herein, have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendant has been compromised and settled and said defendant released from all claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

Wherefore this defendant prays that said action be hence dismissed.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Dated, December 28th, 1936.

Verified.

[File endorsement omitted.]

[fol. 100] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF H. J. HATCH—Filed Dec. 29, 1936

Comes Now H. J. Hatch, one of the defendants hereinabove named, and, by leave of court duly had, files this his supplemental answer to the complaint on file herein and by it shows:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the Southern Pacific Company, one of the defendants herein, have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendant has been compromised and settled and said defendant released from all claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

Wherefore this defendant prays that said action be hence dismissed.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated December 28, 1936.

Verified.

[File endorsement omitted.]

[fol. 101] IN UNITED STATES DISTRICT COURT

WAIVER OF JURY BY PLAINTIFF—Filed December 7, 1936

Come Now the plaintiffs, by their counsel, L. H. Phillips, and waive a jury trial in the above entitled cause and request that said cause proceed to trial before the Honorable Court without a jury.

Dated this 3rd day of December, 1936.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—December 29, 1936

This cause coming on for trial; L. H. Phillips, Esq., appearing for the plaintiffs; H. K. Lockwood and M. W. Reed, Esqs., appearing for defendants The Pullman Company, H. J. Hatch and defendant Myers; Lawrence Livingston, Esq., appearing for defendant A. J. Kash; R. W. Jones being present as official court reporter;

M. W. Reed, Esq., moves for leave on behalf of The Pullman Company and H. J. Hatch to file a supplemental answer, to which plaintiffs object; motion is granted and objection of plaintiff overruled; exception noted. Supplemental Answers are ordered filed with leave to Mr. Livingston to file supplemental answer after noon recess.

M. W. Reed, Esq., for defendants Pullman Co. and Hatch and Myers states willing to waive a jury and at this time to present matters alluded to in the supplemental answers and waives jury for said defendants; Mr. Livingston also waives jury on behalf of defendant Kash. Jury is excused until further notice.

[fol. 103] IN UNITED STATES DISTRICT COURT

ORDER RE ANSWERS—Filed January 22, 1937

Good Cause Appearing Therefor, it is hereby Ordered that the supplemental answer of H. J. Hatch, one of the defendants in the above entitled action, to the complaint therein, be deemed to be and be, and stand for and as the supplemental answer also of Edward E. Meyers, one of the defendants in said action.

It is Further Ordered that this Order be entered nunc pro tunc and appear of record as of the 29th day of December, 1936, that being the date the said supplemental answer of said H. J. Hatch was filed, exception noted to plaintiffs.

Dated, this 22nd day of January, 1937.

Leon R. Yankwich, Judge.

[File endorsement omitted.]

[fol. 104] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 22, 1937

This Cause came on regularly for trial on the 29th day of December, 1936, before the Court, sitting without a jury, a jury having been waived in open Court by all parties to this action immediately prior to the commencement of the

trial. Plaintiffs appeared herein by L. H. Phillips, Esq., their attorney, defendant, The Pullman Company, appeared herein by its Attorneys Robert Brennan, M. W. Reed, Leo E. Sievert and H. K. Lockwood, and defendants H. J. Hatch and Edward E. Meyers (sued herein as John Doe One) appeared by Robert Brennan and M. W. Reed, Esq., their attorneys, and defendant A. J. Kash appeared by Messrs. Livingston & Livingston and Lawrence Livingston, Esq., his attorneys; and this action having been dismissed by plaintiffs as against defendants Southern Pacific Company and Fred M. Dolsen (sued herein as John Doe Two), and defendants The Pullman Company, H. J. Hatch and A. J. Kash having moved in open court for leave to file supplemental answers herein and said motions having been granted, and supplemental answers having been filed herein by said defendants The Pullman Company, H. J. Hatch and A. J. Kash, and the Court having made an order nunc pro tunc herein that the supplemental answer of defendant, H. J. Hatch be deemed to be and be and stand as and for the supplemental answer also of defendant Edward E. [fol. 105] Meyers, and as more fully appears from said supplemental answers said answers have tendered certain pleas in bar which are hereinafter more fully referred to, and each of the parties having stipulated in open court that said pleas in bar might be tried forthwith and prior to the trial of this action upon its merits, and said pleas in bar having accordingly been duly tried and evidence having been introduced relevant, competent and material to said pleas in bar, and the Court having considered the same, now finds as follows:

(1) That the first cause of action set forth in the complaint herein is stated jointly against all the defendants as joint tort-feasors.

(2) That the second cause of action therein stated is against defendant A. J. Kash alone, but that the two said causes of action against said A. J. Kash are the same.

(3) That subsequent to the commencement of this action and prior to the trial thereof, plaintiffs and defendants Southern Pacific Company and Fred M. Dolsen made and entered into an agreement under the terms whereof the cause of action pleaded in the complaint herein against said

defendants Southern Pacific Company and Fred M. Dolsen was compromised and settled and said defendants were released from all claims arising out of the matters and things set forth in said complaint.

(4) That subsequent to the commencement of this action and prior to the trial thereof, the Superior Court of the State of California, in and for the County of Los Angeles, by order duly made on the Petition of Plaintiff Garnett V. [fol. 106] Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, in the matter of the estate of Robert L. Jenkins, Deceased, Probate No. 154390, confirmed and approved said compromise and settlement and ordered that she be permitted to dismiss said cause of action as against defendant Southern Pacific Company.

(5) That subsequent to the commencement of this action and prior to the trial thereof, this action was voluntarily dismissed by plaintiffs as to defendants Southern Pacific Company and Fred M. Dolsen for a valuable consideration paid to plaintiffs by said defendants, to wit: the sum of Twenty-Five Hundred Dollars ($2500.00), the dismissal being signed by the Attorney for the plaintiffs, approved by the attorney for the said two defendants and ordered filed by the Court.

(6) That plaintiffs have been paid the said sum of Twenty-Five Hundred Dollars ($2500.00) as compensation for the death of Robert L. Jenkins by defendants Southern Pacific Company and Fred M. Dolsen and in consideration of said payment plaintiffs have voluntarily dismissed this action and such dismissal has released said defendants Southern Pacific Company and Fred M. Dolsen from any liability or responsibility on account of any of the matters or things set forth in the complaint herein.

(7) That said compromise and settlement and the said dismissal, and the payment of a substantial sum of money, to wit: Twenty-Five Hundred Dollars ($2500.00), amounted to a settlement of the entire controversy and the release of the causes of action as to all the defendants.

[fol. 107] (8) That no evidence has been offered or received herein with reference to any of the matters or things alleged in the complaint.

And from the foregoing Findings of Fact the Court makes the following

Conclusions of Law

(1) That none of the issues tendered by the complaint herein should be tried.

(2) That the pleas in bar of said defendants should be and the same are hereby sustained.

(3) That this action should be dismissed upon its merits as to all defendants and that defendants The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash are entitled to judgment in their favor and against plaintiffs for their costs herein incurred.

Let judgment be entered accordingly.
Dated, January 22, 1937.
Leon R. Yankwich, United States District Judge.

Approved as to form, as provided in Rule 44. L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 108] In United States District Court, Southern District of California Central Division

No. 7421-Y. Civil

Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad Litem, Plaintiffs,

vs.

Southern Pacific Company, a Corporation; The Pullman Company, a Corporation, A. J. Kash, H. J. Hatch, Edward E. Meyers, John Doe One and John Doe Two, Defendants

Judgment—Filed February 5, 1937

On the 22nd day of January, 1937, the Court filed herein its "Findings of Fact and Conclusions of Law"; and it appearing therefrom that this action has heretofore been

settled, compromised, and dismissed as to the defendants, Southern Pacific Company, a corporation, and Fred M. [fol. 109] Dolsen (sued herein as John Doe Two); and it further appearing therefrom, that this action is dismissed upon its merits as to all defendants, and that the defendants The Pullman Co., H. J. Hatch, Edward E. Meyers and A. J. Kash are entitled to judgment in their favor and against plaintiff for their costs herein incurred; and that judgment be entered accordingly;

Now, Therefore, pursuant to the premises aforesaid, it is Ordered, Adjudged and Decreed, that this action be, and the same hereby is dismissed as to the defendants, The Pullman Co., H. J. Hatch, Edward E. Meyers and A. J. Kash, and that the said defendants do have and recover of and from the plaintiffs herein Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem, their costs incurred herein, taxed at $56.05.

Judgment entered and recorded January 22nd, 1937.

R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

[File endorsement omitted.]

[fol. 110] In United States District Court

Objections to Proposed Findings and Proposed Amendments by the Plaintiffs—Filed January 27, 1937

Objections Overruled. Exception. L. R. Y.

Come Now the plaintiffs and objection to the proposed Findings submitted by the defendants, and respectfully move the court to amend said Findings in the following particulars, to-wit:

On Page 2, at line 11, after the word "and", insert "documentary".

On Page 2, at line 24, after the word "whereof", strike the following: "the cause of action pleaded in the complaint herein against said defendants, Southern Pacific Company and Fred M. Dolsen was compromised and settled and said defendants were released from all claims arising out of the matters and things set forth in said complaint"; and insert in lieu thereof, the following: plaintiffs agree to refrain

from instituting, pressing or in any way aiding any claims, demand, action, or causes of actions for damages against the defendants, Southern Pacific Company and Fred M. Dolsen.

[fol. 111] On Page 3, at line 4, after the word "said", strike "compromise and settlement", and insert in lieu thereof, "covenant not to sue".

On Page 3, at line 30, after the word "evidence", strike the following, "has been offered or", and in lieu thereof insert the word "was".

The plaintiffs further enter an objection to the Findings of Fact and Conclusions of Law as proposed by the defendants.

Dated January 27th, 1937.

Respectfully submitted, L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 112] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO DEFENDANTS' COSTS AND DISBURSEMENTS AND MOTION TO TAX COSTS—Filed January 27, 1937

Comes Now the plaintiffs and hereby move the Honorable Court to tax the costs in the above entitled action, and to strike out of the defendants' disbursements and costs filed herein, the following items, to-wit:

1. Premium on Surety Bond $10.00, on the ground that it is not properly chargeable as a cost in said action.

2. Strike out the following items, to-wit: Witness fees—R. H. Higgins, $2.50; S. A. Barnes, $2.50; Charles Scurry $2.50 and M. K. Sheehan $2.50 on the ground that said items are not properly chargeable as costs in said action, in that said witnesses were not called to testify, and further that the defendants moved the Honorable Court for leave to file supplemental answers in said cause and motions tendering certain pleas in bar, and moved the Honorable Court to determine said pleas in bar and prior to the trial of said cause upon its merits, and that said pleas in bar having been accordingly tried, and therefore said cause not being at issue, and after argument of counsel, the Court granted said mo-

tions and permitted the filing of said supplemental answers and sustained said pleas in bar, and that said cause was not tried upon its merits.

Dated January 27, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 113] IN UNITED STATES DISTRICT COURT

AFFIDAVIT SUPPORTING OBJECTIONS TO DEFENDANTS COSTS AND DISBURSEMENTS AND MOTION TO TAX COSTS—Filed January 27, 1937

STATE OF CALIFORNIA,
County of Los Angeles, ss:

L. H. Phillips, being duly sworn deposes and says: That he is the attorney of record for the plaintiffs, and he was present in court on the 29th day of December, 1936, in the Court room of the Honorable Leon R. Yankwich, being the time and place where said cause was called for trial. That upon counsel answering to the call of Calendar, they were ready for trial, but defendants, The Pullman Company, H. J. Hatch and Edward E. Meyers moved the Honorable Court for permission for leave to file supplemental answers in said cause and motions tendering certain pleas in bar, and moved the Honorable Court that said pleas in bar be determined first before the trial of said cause upon its merits. That no witnesses on behalf of said defendants were called to testify in behalf and in support of said motions, and that after argument of counsel, the court granted to said defendants, aforesaid, said motions and permitted said supple- [fol. 114] mental answers to be filed, and did sustain the motions and pleas in bar made by said defendants, as aforesaid, and said cause was dismissed as to said defendants without said cause being tried upon its merits or calling any witnesses.

L. H. Phillips.

Subscribed and sworn to before me this 27th day of January, 1937. M. B. Liggett, Notary Public in and for said County and State. (Seal.)

[File endorsement omitted.]

[fol. 115] IN UNITED STATES DISTRICT COURT

Engrossed Bill of Exceptions—Filed March 2, 1937

Be it Remembered that the above entitled case came on regularly for trial on Tuesday, the 29th day of December, 1936, at the hour of 10:00 o'clock A. M. of said day before the Honorable Leon R. Yankwich, Judge Presiding, in the District Court of the United States, Southern District of California, Central Division, sitting without a jury.

Plaintiffs, Mrs. Garnett V. Jenkins and Mrs. Garnett V. Jenkins as Guardian Ad Litem of Robert W. Jenkins, appeared in person and by their attorney, L. H. Phillips, Esquire; the defendants, H. J. Hatch and Edward E. Myers, appeared by their attorneys, Robert Brennan, Esquire and M. W. Reed, Esquire; the defendant, The Pullman Company, appeared by its attorneys, Robert Brennan, Esquire, M. W. Reed, Esquire, Leo E. Sievert, Esquire, and H. K. Lockwood, Esquire; and the defendant, A. J. Kash, appeared in person and by his attorney, Lawrence Livingston, Esquire of Livingston & Livingston.

Thereupon, the following proceedings and none other were had and the following documentary evidence and none other was received, to-wit:

Before any evidence was offered the defendants, The Pullman Company, H. J. Hatch, Edward E. Myers and A. J. Kash, each, with leave of Court first had, filed supplemental answers in which it was alleged that the plaintiffs and the defendants, Southern Pacific Company and Fred M. Dolsen, had therefore entered into an agreement whereby the cause [fol. 116] of action pleaded in the complaint had been compromised and settled and the last named defendants released from all claims arising out of the matters set forth in the complaint; that the plaintiffs received the sum of Twenty-five Hundred Dollars ($2500.00) as compensation for the death of Robert W. Jenkins, and in consideration of such sum dismissed the action voluntarily. Said supplemental answers further pleaded the settlement as a full release of the cause of action in the complaint.

Leave of Court was duly given for the filing of the supplemental answers.

Thereupon the respective counsel for plaintiffs and defendants stipulated and agreed that the Court hear the evidence to be offered in support of the defendants' pleas in bar raised by their supplemental answers and that the ques-

tion of law raised thereby be determined by the Court before the taking of any further testimony on the other issues raised by the pleadings.

The defendants thereupon offered in evidence a certified copy of the following instrument:

EXHIBIT "A"

"Covenant Not to Sue

"The undersigned, Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, of the City of Los Angeles, County of Los Angeles, State of California, for our heirs, executors, administrators and assigns, in consideration of Twenty-Five Hundred Dollars ($2500.00) Paid by Southern Pacific Company, a corporation, the receipt of which is hereby acknowledged, do by [fol. 117] this instrument covenant with the said Southern Pacific Company, a corporation, and Fred M. Dolsen, forever to refrain from instituting, pressing or in any way aiding any claim, demand, action, or cause of action for damages, costs, loss of service, expense or compensation for, on account of, or in any way growing out of, or hereafter to grow out of, the injury or death of Robert L. Jenkins, deceased, husband of the said Mrs. Garnett V. Jenkins, and father of the said Robert W. Jenkins, occurring on the 29th day of March, 1935, or his said death on the 19th day of April, 1935 while in the employ of the said Southern Pacific Company, a corporation, as passenger conductor or otherwise, and running between various points and particularly on the 29th day of March, 1935 between Los Angeles, California and San Luis Obispo, California in which the said Robert L. Jenkins claimed to have received a blow on the head from one, A. J. Kash, and it is alleged that the said Robert L. Jenkins, deceased, died as a result of said blow by the said A. J. Kash on the 29th day of March, 1935, or from any other injury or cause while in the employ of Southern Pacific Company, a corporation, or otherwise, which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his

guardian ad litem, plaintiff, vs. Southern Pacific Company, a corporation, et al., No. 7421-Y, or from any cause or causes whether set forth in said complaint as aforesaid or otherwise, or at any time from the beginning of the world to the date of this instrument, reserving to the undersigned all rights that they, or either of them, may now have or hereafter have against any other person or persons, firms or cor-
[fol. 118] porations because of the death of the said Robert L. Jenkins, deceased.

"It is further agreed that the undersigned, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named, and it is further understood that said Southern Pacific Company, a corporation, does not in any manner or to any extent admit any liability or responsibility for the above claimed damages, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph herein specified.

"In Witness Whereof, the undersigned have hereunto set their hands this 21st day of December, 1936.

"Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad Litem.

"State of California,
County of Los Angeles, ss:

"On This 21st day of December, A. D., 1936, before me, L. H. Phillips, a Notary Public in and for said County and State, personally appeared Mrs. Garnett V. Jenkins, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

[fol. 119] "In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

"L. H. Phillips, Notary Public in and for said County and State. (Seal.)"

The defendants thereupon offered in evidence a certified copy of the following instrument:

"In the Superior Court of the State of California, in and for the County of Los Angeles

"No. 154390

"In the Matter of the Estate of Robert L. Jenkins, Deceased

"Petition for Confirmation of Administratrix's Covenant Not to Sue

"Comes Now Mrs. Garnett V. Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, and respectfully shows to the court as follows:

I

"That on the 10th day of December, 1935 your petitioner was duly appointed Administratrix of the Estate of Robert L. Jenkins, Deceased, by the Superior Court of the State of California in and for the County of Los Angeles and has ever since been the duly appointed, qualified and acting Administratrix of said estate.

[fol. 120] II

"That your Administratrix filed an action against the Southern Pacific Company, et al., in the above entitled court on the 27th day of September, 1935 predicated upon an injury claimed to have been received by her husband while a railroad conductor on the train of the defendant, Southern Pacific Company, caused by a passenger on said train who was drunk and disorderly and struck the deceased, from which your petitioner claimed the deceased passed away on the 19th day of April, 1935; that said cause was removed to the District Court of the United States, Southern District of California, Central Division, upon application of the defendants and is now pending in said District Court of the United States and numbered 7421-Y.

III

"That your petitioner did on the 21st day of December, 1936 enter into a Covenant Not to Sue with said Southern Pacific Company, defendant, a copy of which is hereto at-

tached and made a part of this petition as if set out at length herein, for a consideration of Twenty-Five Hundred Dollars ($2500.00); that your petitioner is advised and so believes that there is a question as to whether or not recovery could be had against the Southern Pacific Company, and therefore your petitioner verily believes that if a recovery could not be had the estate would be put to great expense in the trial of said cause against said Southern Pacific Company and respectfully requests the court that said Covenant Not to Sue entered into between said defendant, Southern Pacific Company, and your petitioner be confirmed.

[fol. 121] "Wherefore your petitioner prays that the court make an order confirming said Covenant Not to Sue and permitting the petitioner to dismiss said cause as against the Southern Pacific Company.

"Mrs. Garnett V. Jenkins, Administratrix. L. H. Phillips, Attorney for Administratrix.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

"Mrs. Garnett V. Jenkins, being first duly sworn, deposes and says: That she is the petitioner in the above entitled matter; that she has read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

"Mrs. Garnett V. Jenkins.

Subscribed and sworn to before me this 23rd day of December, 1936. L. H. Phillips, Notary Public in and for Said County and State."

[fol. 122] The defendants thereupon offered in evidence a certified copy of the following instrument:

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 154390

In the Matter of the Estate of ROBERT L. JENKINS, Deceased

Order Confirming Covenant Not to Sue

"Upon reading and filing the annexed petition praying for confirmation of the Covenant Not to Sue entered into

by and between the Administratrix of the above entitled estate, Mrs. Garnett V. Jenkins, and Southern Pacific Company, and it appearing to the court that it will be for the benefit of the estate to confirm said Covenant Not to Sue and to permit said Administratrix to dismiss said cause of action as against the Southern Pacific Company, a corporation.

"It is Hereby Ordered that the Covenant Not to Sue entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be permitted to dismiss said cause of action as against Southern Pacific Company, a corporation.

"Done in open court this 23rd day of December, 1936.

"Elliot Craig, Judge of the Above Entitled Court."

[fol. 123] Which said three foregoing instruments were duly admitted in evidence and together marked "Exhibit A".

The defendants thereupon offered in evidence a dismissal of said action as against the defendants, Southern Pacific Company and Fred M. Dolsen, duly approved by the Court, and filed, and reading as follows:

EXHIBIT "B"

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 7421-Y

MRS. GARNETT V. JENKINS, et al., Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, et al., Defendants

DISMISSAL

"To the Clerk of the United States District Court, Southern District of California, Central Division:

"You will enter the dismissal of the above entitled action as against the defendants, Southern Pacific Company and Fred M. Dolsen.

"Dated This 24th day of December, 1936.

"L. H. Phillips, Attorney for Plaintiffs."

[fol. 124] "It is so ordered:

"Leon R. Yankwich, Judge.

"Decree entered and recorded December 28, 1936.

"R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk."

Which said instrument was duly admitted in evidence as "Exhibit B".

And the foregoing includes and contains all the proceedings had and all the evidence tendered and all the evidence received upon the trial of said cause and the matter was thereupon submitted to the Court for its decision.

RULING OF COURT

Thereupon, the Court made the following ruling:

"The plea in bar interposed by the defendants, and which by consent of counsel was tried ahead of the trial on the merits, will be sustained, and on the basis of the evidence as presented on the plea in bar, the action will be dismissed upon the ground that the plaintiffs before the trial of this case had settled the controversy and cause of action with two of the co-defendants, and two of the joint tort-feasors, and the settlement of the controversy and subsequent dismissal, together with all the other circumstances, as well as [fol. 125] the payment of a substantial sum of money, to-wit, $2500.00, amounted to a release of the cause of action as to all of the defendants, and exception will be noted, and findings will be limited to the plea in bar."

To which plaintiffs duly excepted and still except.

That thereupon, and within the time allowed by law, the above entitled court did make and execute its written order extending time to plaintiffs to file their Engrossed Bill of Exceptions to and including the 8th day of February, 1937.

The plaintiffs present the foregoing as their Bill of Exceptions herein and pray that the same may be settled, allowed and certified as part of the record herein.

L. H. Phillips, Attorney for Plaintiffs.

The foregoing Bill of Exceptions was presented this 3rd day of March, 1937 to the said Honorable Leon R. Yankwich by the plaintiffs in accordance with orders of court heretofore entered pertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein for the approval, signature and seal of said Honorable Leon R. Yankwich. Said Bill of Exceptions was delivered to counsel for defendants for examination as said counsel and the approval, signature and seal of the same was taken under advisement of said Court.

Leon R. Yankwich, Judge of United States District Court.

[fol. 126] STIPULATION

It is hereby stipulated by and between counsel for plaintiffs and counsel for defendants in the above entitled action that the foregoing Bill of Exceptions is a true and correct copy in narrative form of all the evidence and exhibits offered.

Dated this 1st day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs. Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch and Edward E. Myers. Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company. Livingston & Livingston, Attorneys for Defendant, A. J. Kash.

[fol. 127] Received copy of the within Bill of Exceptions this 1st day of March, 1937.

Robert Brennan, M. W. Reed, Attorneys for Defendants, H. J. Hatch and Edward E. Myers. Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Rec'd Copy March 2, 1937.

Livingston & Livingston, by J. K. B., Attorneys for Defendant, A. J. Kash.

[File endorsement omitted.]

[fol. 128] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 19, 1937

To the Honorable Leon R. Yankwich, Judge of Said Court:

Come Now Mrs. Garnett V. Jenkins and Mrs. Garnett V. Jenkins, as Guardian Ad Litem of Robert W. Jenkins, by L. H. Phillips, Esquire, her attorney, and feeling themselves aggrieved by the final judgment of this court entered against them in favor of defendants on the 22nd day of January, 1937 hereby pray that an appeal may be allowed to the Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States, for the Southern District of California, Central Division, and in connection with this petition petitioners herewith present their Assignment of Errors.

Dated this 15th day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 129] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 19, 1937

And Now Comes plaintiffs by L. H. Phillips, Esquire, their attorney, and in connection with their petition for an appeal say that the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of plaintiffs, to-wit:

I

The court erred in denying plaintiffs' motion to remove the action to the Superior Court of the State of California in that the pleadings show that all defendants except one are residents of the State of California.

[fol. 130]

II

The court erred in ruling that the first and second count of plaintiffs' second amended complaint constituted together the same tort and were indivisible.

III

The court erred in ruling that the document entitled "Covenant Not to Sue" (Exhibit A) was a release.

IV

The court erred in its Findings of Fact and Conclusions of Law, to-wit:

(a) Page 2, line 11, in not inserting the word "documentary" before the word "evidence";

(b) Page 3, line 4, after the word "said", in refusing to strike "compromise and settlement" and inserting in lieu thereof "Covenant Not to Sue",

to which exception was duly noted by the court.

V

The court erred in overruling plaintiffs' objections to defendants' costs and disbursements and motion to tax costs in that certain witnesses' fees were not properly chargeable as costs in said action in that witnesses were not called to testify by reason of defendants' insistence in tendering the plea at bar.

By Reason Whereof plaintiffs pray that the aforesaid judgment may be reversed.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 131] In United States District Court

Order Allowing Appeal—Filed March 30, 1937

Upon motion of L. H. Phillips, Esquire, attorney for plaintiffs, and upon filing a petition for an appeal and an assignment of errors,

It is Ordered that an appeal be and hereby is allowed to have reviewed by the United States Circuit Court of Appeals For the Ninth Circuit the judgment heretofore entered

herein, and that the amount of cost bond on said Assignment of Error be and hereby is fixed at $250.00.

Dated this 30th day of March, 1937.

Leon R. Yankwich, District Judge.

[File endorsement omitted.]

[fol. 132] In United States District Court

Stipulation for Costs on Appeal—Filed April 9, 1937

Know All Men by These Presents, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Southern Pacific Company, a corporation, The Pullman Company, a corporation, et al., Defendants in the above entitled case, in the penal sum of Two hundred fifty and no/100 ($250.00) Dollars, to be paid to said Defendants, their successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation is Such, That Whereas Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made on December 29th, 1936, and entered on January 22nd, 1937 by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

[fol. 133] Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 9th day of April, 1937.

Fidelity and Deposit Company of Maryland, by W. H. Cantwell, Attorney in Fact. (Seal.)

Attest: Theresa Fitzgibbons, Agent.

Examined and recommended for approval as provided in Rule 28.

L. H. Phillips, Attorney for Appellants.

Approved this 9 day of April, 1937.

Wm. P. James, District Judge.

[fol. 134] STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 9th day of April, 1937, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

S. M. Smith, Notary Public in and for the State of California, County of Los Angeles. My Commission Expires Feb. 18, 1938. (Seal.)

[File endorsement omitted.]

[fol. 135] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed April 2, 1937

The Clerk of this Court is hereby directed to prepare and certify the transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals For The Ninth Circuit by including therein the following:

1. Plaintiffs' Motion to Remand to the State Court;
2. Second Amended Complaint;
3. Answer of The Pullman Company to the Second Amended Complaint;
4. Answer of A. J. Kash to the Complaint;

5. Answer of H. J. Hatch and Edward E. Myers to the Second Amended Complaint;
6. Answer of Southern Pacific Company and Fred M. Dolsen to the Second Amended Complaint;
7. Supplemental Answers of H. J. Hatch, The Pullman Company and A. J. Kash to the Second Amended Complaint;
8. Findings of Fact and Conclusions of Law;
9. Judgment;
10. Objections to Proposed Findings and Plaintiffs' Proposed Amendments;
11. Affidavit Supporting Objections to Defendants' Costs and Disbursements and Motion to Tax Costs;
[fol. 136] 12. Objections to Defendants' Costa and Disbursements and Motion to Tax Costs;
13. Bill of Exceptions of March 3rd, 1937;
14. All certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court;
15. The Petition for Appeal and Plaintiffs' Assignment of Errors;
16. Orders of the Court and the Judge in chambers relating thereto;
17. Undertaking on Appeal;
18. The certificate of the Clerk of the record on Petition for Appeal herein;
19. Petition for Appeal;
20. All endorsements.

Dated this 15th day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 137] IN UNITED STATES DISTRICT COURT

COUNTER PRAECIPE—Filed April 5, 1937

To the Clerk of Said Court:

SIR:

Please incorporate in the certified transcript of the record on appeal in the above entitled cause additional portions of the record as follows:

1. Complaint;
2. Petition for Removal;
3. Notice of Motion of Removal;
4. Amended complaint;
5. Removal Bond;
6. Order of Removal;
7. Stipulation filed December 27, 1935;
8. Dismissal filed December 28, 1936;
9. Order dated and filed January 22, 1937;
10. Notice of Ruling denying motion to remand, filed Feb. 27, 1936.
11. Order filed March 19, 1936;
12. Summons and returns thereon;
13. Demurrer of H. J. Hatch to amended complaint filed January 17, 1936.

[fol. 138] 14. Minute Order entered January 29, 1936 sustaining demurrer of H. J. Hatch;

15. Request for balance of transcript filed March 9, 1936;
16. Order filed March 19, 1936;
17. All endorsements.

Dated this 2nd day of April, 1937.

Robert Brennan, M. W. Reed, Attorneys for Def'ts H. J. Hatch and Edward E. Myers. Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood. Attorneys for Deft. The Pullman Co.

[File endorsement omitted.]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 138 pages, numbered from 1 to 138 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; amended complaint; notice of motion of removal; petition for removal; removal bond; order granting petition and approval of bond; order of removal; answer of A. J. Kash; stipulation and order thereon; demurrer of H. J. Hatch; motion to remand to State Court; order sustaining demurrer; second amended complaint; order denying motion to remand notice of ruling on order denying motion to remand; answer of the Pullman Company to the second amended complaint; request for balance of transcript; summons, and return thereon; answer of Edward E. Myers; answer of H. J. Hatch; order for additional transcript; answer of Southern Pacific Company and Fred M. Dolsen; dismissal; supplemental answer of A. J. Kash; supplemental answer of the Pullman Company; supplemental answer of H. J. Hatch; waiver of jury; order of December 29, 1936; order of January 22, 1937, regarding supplemental answer of Edward E. Myers; findings of fact and conclusions of law;

judgment; objections to proposed findings and proposed amendments by the plaintiff, and order thereon; objections to defendants' costs and disbursements and motion to tax costs; affidavit supporting objections to defendants' costs and disbursements and motion to tax costs; engrossed bill of exceptions; petition for appeal; assignment of errors; order allowing appeal; stipulation for costs on appeal; praecipe and counter praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is $171.56 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $21.80 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 18th day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-first.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed May 20, 1937. Paul P. O'Brien, Clerk.

No. 8558

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, his Guardian ad Litem,

Appellants,

vs.

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Parker Printing Company, 545 Sansome Street, San Francisco

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, February 1, 1938.

Before: Garrecht, Mathews and Haney, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION, ETC.

Pursuant to oral stipulation of Mr. Henry N. Cowan, counsel for appellants, of Mr. M. W. Reed, counsel for appellee The Pullman Company, and of Mr. David Livingston, counsel for appellee A. J. Kash, for submission of this cause of briefs on file, and

Upon consideration of oral motion of Mr. M. W. Reed, for dismissal of the appeal herein, and motion to file formal motion to dismiss, and good cause therefor appearing,

It is ordered that this cause be submitted to the court for consideration and decision on briefs, with leave to counsel for appellees to file motion to dismiss appeal, with supporting authorities, within ten days from date, and with leave to counsel for appellants to reply thereto and file reply brief within fifteen days thereafter.

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United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, April 19, 1938.

Before: Garrecht, Mathews and Haney, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION.

Before: Garrecht, Mathews and Haney, Circuit Judges.

Haney, Circuit Judge.

Two procedural questions and one substantive question are submitted to us, the former involving

removability of an action commenced in a state court, and the latter involving the effect of an instrument signed by appellant, after commencement of the action, as to whether or not it extinguished the entire action.

Southern Pacific Company, hereinafter called the railroad, is a Kentucky corporation. Robert L. Jenkins, a resident of California, was employed by it as a passenger conductor. Fred M. Dolsen, a resident of California, was employed by it as a gate tender at its passenger station in the City of Los Angeles, to examine tickets of passengers, before their entry through the gates to board trains.

The Pullman Company, hereinafter called the company, is an Illinois corporation. H. J. Hatch, a resident of California, was employed by it as a Pullman conductor. Edward E. Myers, whose place of residence does not appear, was employed by it as a Pullman porter.

The railroad hauls the company's sleeping cars and equipment under an agreement between them. Under rules of the railroad, its conductor or other officer in charge shall eject disorderly passengers from its trains, and is permitted to call to his assistance city, county or California State peace officers. Likewise, employees of the railroad are instructed to preserve order in and about its stations.

On March 29, 1935, the railroad ordered Robert L. Jenkins to take charge, as conductor, of its train, leaving Los Angeles destined for San Francisco. About eight o'clock in the evening of that day, the

railroad's gate tender, Fred M. Dolsen, permitted one A. J. Kash to pass through its gates in order to board the train, without displaying a ticket. Kash at that time was intoxicated, loud, boisterous, disorderly, and was using profane and indecent language. The Pullman conductor and the Pullman porter permitted Kash to board the train, and he continued his objectionable and annoying conduct. Efforts of the Pullman conductor to induce Kash to desist from his disorderly conduct failed. The Pullman conductor thereupon called Jenkins to assist him. Remonstrances of Jenkins had no effect. Jenkins called police officers of the City of Ventura to assist in ejecting Kash from the train at that place. The police officers arrested Kash, and as they were taking him from the train, Kash struck and injured Jenkins.

Jenkins died as a result of the injuries caused by the blow, on April 19, 1935. His wife, Garnett V. Jenkins, and his minor son, Robert W. Jenkins, survived him. On September 27, 1935, Garnett V. Jenkins was appointed guardian ad litem for Robert W. Jenkins, and individually, and as such guardian ad litem, brought an action against the railroad, its gate tender, the company, its conductor, its porter, and Kash to recover for the death of Jenkins, in a California state court.

The complaint contained two causes of action, the first being brought against, and grounded on the negligence of all defendants, and the second being brought against Kash only, and charged him with

assault and battery. Recovery of $50,000 on each cause of action was prayed for. The first cause of action failed to allege that Jenkins was engaged in work, or performing services, which were a part of interstate commerce at the time of his injury, and failed to allege negligence of the Pullman conductor.

On November 20, 1935, the company filed in the state court, a petition to remove the cause to the court below.

On November 25, 1935, Garnett V. Jenkins individually, and as guardian ad litem for Robert W. Jenkins, filed an amended complaint in the state court,[1] containing two causes of action, being the same as those contained in the original complaint. The amended complaint alleged, in the first cause of action, the same facts as were contained in the first cause of the original complaint, but failed to allege negligence of the Pullman conductor. There was an allegation in the first cause of action of the amended complaint, that the action was brought, as against the railroad, under the Employer's Liability Act.

On the same day, November 25, 1935, an order of removal was made by the state court. On December 10, 1935, in a probate proceeding in the state court, Garnett V. Jenkins was appointed administratrix of the estate of Jenkins, deceased, and on Decem-

[1]Counsel for appellees state that the railroad had filed, and the state court had sustained a demurrer to the original complaint, which may have been the reason for the amended complaint, although the record here does not disclose such fact.

ber 27, 1935, the court below made an order substituting Garnett V. Jenkins, as such administratrix (hereinafter called appellant), as plaintiff, for Garnett V. Jenkins, individually and as guardian ad litem, pursuant to a stipulation.

On January 17, 1936, the Pullman conductor filed in the court below a demurrer. On January 22, 1936, appellant filed a motion to remand the cause to the state court.

The demurrer filed by the Pullman conductor was sustained on January 29, 1936. Appellant filed a second amended complaint on February 8, 1936. It contained the same two causes of action, the only essential difference being that the first cause of action of the second amended complaint alleged that at the time of his injury Jenkins was performing services which were a part of interstate commerce, and that the Pullman conductor was negligent. It was unlike the first causes of action in the original and amended complaints in those respects.

The motion to remand was denied by the court below on February 19, 1936. On December 7, 1936, appellant filed in the court below an instrument entitled "Waiver of Jury".

On December 21, 1935, Garnett V. Jenkins, individually, and as guardian ad litem executed and acknowledged a document entitled a "Covenant Not To Sue". In consideration of the sum of $2,500 those parties by that document covenanted with the railroad that they would

"forever * * * refrain from instituting, pressing or in any way aiding any claim * * * or cause of action for damages * * * on account of * * * the injury or death of Robert L. Jenkins, deceased * * * which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, plaintiff, vs. Southern Pacific Company, a corporation, et al. * * *"

Another provision was that "Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named * * *"

On December 23, 1936, appellant filed a petition in the state court probate proceedings stating that she, as administratrix, had filed an action predicated upon an injury to the deceased, and that such action had been removed to the court below; and that she, as administratrix, had entered into a "Covenant Not To Sue" with the railroad, a copy of which was attached. She prayed for "an order confirming said Covenant Not to Sue and permitting the petitioner to dismiss said cause as against the Southern Pacific

Company". On the same day the state court ordered "that the Covenant Not to Sue entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be permitted to dismiss said cause of action as against Southern Pacific Company, a corporation".

On the following day, the court below dismissed the action as against the railroad and the gate tender.

On December 29, 1936, the company, the Pullman conductor, the Pullman porter,[2] and Kash, all filed supplemental answers that the "Covenant Not to Sue" released[3] the cause of action stated against them. The answers were treated as pleas in bar, and trial was had thereon on the same day. The court below held that the instrument "amounted to a release of the cause of action as to all of the defendants". See 17 F. Supp. 820. Findings and judgment of dismissal followed, on January 22, 1937. Appellant appealed from the judgment.

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[2]The Pullman conductor's supplemental answer stood also as the supplemental answer of the Pullman porter because of a nunc pro tunc order made January 22, 1937.

[3]It should be noted that the supplemental answers are based on the theory that Garnett V. Jenkins, individually and as guardian ad litem released a cause of action held by "Garnett V. Jenkins, administratrix of the estate of Robert L. Jenkins, deceased". Neither party has presented argument as to whether anyone but the administratrix could actually release such cause of action.

Notwithstanding the fact that appellant had been substituted as plaintiff, the record here does not disclose that any of the parties noted or observed such substitution in either the captions or allegations of pleadings or other documents filed. The judgment for costs was against, and the appeal was taken by Garnett V. Jenkins, individually, and as guardian ad litem. At the argument appellees asked for, and were granted, ten days within which to file a motion to dismiss, on the ground that the appeal was not taken by the proper party. Within the ten day period, they declined to so move. Had the motion been made it would have been denied. Appellant has the right to amend. Mo., Kans. & Tex. Ry. v. Wulf, 226 U. S. 570, 576. In 49 C. J. 130, §135, it is said:

> "* * * While a caption or title may be considered a proper formal part of a declaration, complaint, or petition, it has been said that, strictly speaking, a caption is no part thereof, except where by express reference thereto in the pleading itself it is made a part thereof; and accordingly it has generally been held that a defective caption, or no caption at all, is merely a formal defect and not fatal, which may be waived by answering to the merits * * *"

It would be a mere ceremony to remand the case so that the amendment might be made, and therefore we shall consider the appeal papers as amended. Cf. Norton v. Larney, 266 U. S. 511, 516; Realty Co. v. Donaldson, 268 U. S. 398, 400.

Appellees point out that appellant did not except to the order denying the motion to remand. Likewise, she does not appeal from such order.

At common law, the death of a human being was not a ground of action for damages.[4] That rule, and the rule that a servant assumed the risk of his employment,[5] prevented recovery from an employer for the death of an employee caused by the negligence of a fellow-servant.[6]

Many of the states, prior to 1908, had modified or displaced those rules by legislation. Second Employers' Liability Cases, 223 U. S. 1, 51. California first modified the common law in 1862 by statute. 8 Cal. Jur. 953, §15. In 1874 modification of the common law was made by statute. 8 Cal. Jur. 952, §15. That provision now effective is Code of Civil Procedure, §377, which provides in part:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person * * *"

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[4]Insurance Co. v. Brame, 95 U. S. 754, 756; The Harrisburg, 119 U. S. 199, 204; Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 68.

[5]New England Railroad Co. v. Conroy, 175 U. S. 323, 327, 328.

[6]St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 157.

With respect to the question as to whether the employer was liable for the death of his employee caused by the negligence of a fellow servant, a provision, enacted in 1872, was amended by the employer's liability act of 1907 (Civil Code, §1970). 8 Cal. Jur. 954, §16. That provision has since been superseded by the Workmen's Compensation Act. 27 Cal. Jur. 250, §1; 8 Ca. Jur. Supp. 82, §16. Such provisions, however, are not applicable to an employer, which is a common carrier by railroad and engaged in interstate commerce, because by the Employers' Liability Act of April 22, 1908 (35 Stat. 65, Ch. 149), Congress has acted in that field, superseding state laws in such field. Second Employers' Liability Cases, 223 U. S. 1, 55.

Summarizing, we find that actions for wrongful death, if not against an employer, are governed by the state code section quoted; such actions against an employer, which is a common carrier by railroad and engaged in interstate commerce, are controlled by the federal Employers' Liability Act; and remedy for such death, against an employer not within that description, is that given by the California Workmen's Compensation Act (Tipton v. Atchison Ry. Co., 298 U. S. 141).

The Employers' Liability Act (45 U. S. C. A. §51) provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by

> such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such * * * death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *"

That provision modified the common law. Second Employers' Liability Cases, supra, 49; and see Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, 21. Under that section an action to recover for the death of an employee must be prosecuted by the personal representatives of the deceased employee, and not by the beneficiaries,[7] and the employee must have been engaged in interstate commerce at the time of the injury or death.[8]

Appellant contends that she stated a cause of action under the Employers' Liability Act, and that joinder, with such cause, of other independent causes of action should not defeat the provision in

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[7]American R. R. Co. v. Birch, 224 U. S. 547, 558; Mo. Kans. & Tex. Ry. v. Wulf, 226 U. S. 570, 576; Troxell v. Del., Lack. & West. R. R., 227 U. S. 434, 444; St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 158.

[8]St. L. & San Francisco Ry. v. Seale, supra, 158; Ill. Cent. R. R. v. Behrens, 233 U. S. 473, 478; Pederson v. Del. Lack. & West. R. R. 229 U. S. 146, 150; Shanks v. Del. Lack. & West. R. R., 239 U. S. 556, 557, 558; Erie Railroad Company v. Welsh, 242 U. S. 303, 306.

the act that "no case arising under this chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States". 45 U. S. C. A. §56.

Appellees contend that removability must be determined by the status of the case at the time the original complaint was filed;[9] that all parties defendant, except the company and Kash, must be disregarded in determining the right of removal; that after disregarding such parties, it appears that the cause of action against the company was for negligence, and that the cause of action against Kash was for assault; and that such causes were severable and removal was properly allowed. Appellees say that the original complaint stated no cause of action against the railroad or the Pullman conductor, and therefore those parties should be disregarded;[10] that the gate tender and the Pullman porter had not been served with process and should be disregarded.[11]

There is authority that the subsequent amendments related back to the time of the original complaint,[12] and therefore the railroad and the Pullman

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[9]Saint Paul Mercury Ind. Co. v. Red Cab Co., ... U. S. ...., February 28, 1938.

[10]Cella v. Brown (C. C. A. 8), 144 Fed. 742, cert. den. 202 U. S. 620; Peters v. Plains Petroleum Co. (C. C. A. 10), 43 F.(2d) 49, 50.

[11]Community Bldg. Co. v. Maryland Casualty Co. (C. C. A. 9), 8 F.(2d) 678, 679, cert. den. 270 U. S. 652; Hunt v. Pearce (C. C. A. 8), 284 Fed. 321, 323, 324.

[12]Mo. Kans. & Tex. Ry. v. Wulf, 226 U. S. 570, 576; N. Y. Cent. R. R. v. Kinney, 260 U. S. 340; B. & O. S. W. R. Co. v. Carroll, 280 U. S. 491, 494.

conductor should not be disregarded.[13] If they were not disregarded, the cause of action against the company and the Pullman conductor was not severable, and removal was improper. Chesapeake and Ohio Ry. Co. v. Dixon, 179 U. S. 131; Southern Railway Co. v. Carson, 194 U. S. 136, 138, 139; Alabama Southern Ry. v. Thompson, 200 U. S. 206; Cincinnati & Texas Pacific Ry. v. Bohon, 200 U. S. 221; Chi. B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 425.

We think if it did not sufficiently appear at the time when the petition for removal was filed, that the cause was not severable, then it so appeared when the second amended complaint was filed. Under those circumstances we believe the duty of the court below is expressed in 28 U. S. C. A. §80, which provides in part:

> "If in any suit * * * removed from a State court to a district court of the United States it shall appear to the satisfaction of the said district court, at any time after such suit has

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[13]Chicago, R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184. In addition there are many cases where amendments are considered as relating back in determining questions as to whether or not a bill or complaint states facts showing the jurisdiction of a district court: Chesapeake & O. Ry. Co. v. Coffey (C. C. A. 4), 37 F.(2d) 320, 324; Bison State Bank v. Billington (C. C. A. 5), 228 Fed. 116, 117; Baltimore & O. R. Co. v. M'Laughlin (C. C. A. 6), 73 Fed. 519, 521; Carter-Crume Co. v. Peurrung (C. C. A. 6), 99 Fed. 888, 890; Bowden v. Burnham (C. C. A. 8), 59 F.(2d) 752, 754; Carnegie, Phipps & Co. v. Hulbert (C. C. A. 8), 70 Fed. 209, 218; Goodman v. City of Ft. Collins (C. C. A. 8), 164 Fed. 970, 973.

been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * * the said district court shall proceed no further therein, but shall * * * remand it to the court from which it was removed * * *"

There is here no charge of fraudulent joinder, and we therefore have no occasion to mention the rules governing in such event.

Although the court below refused to remand the cause, we think it our duty to order it remanded. Chi., B. & Q. Ry. Co. v. Willard, supra; McNutt v. General Motors, etc., Corp., 298 U. S. 178, 184; K V O S, Inc. v. Associated Press, 299 U. S. 269, 277; Hare v. Birkenfield, (C. C. A. 9), 181 Fed. 825.

Judgment reversed, with directions to remand the cause to the state court.

Mathews, Circuit Judge (dissenting):

This was an action against the Southern Pacific Company, the Pullman Company, Fred M. Dolsen and three other defendants for damages in the sum of $50,000 for the death of Robert L. Jenkins (hereafter called decedent), an employee of the Southern Pacific Company.

The action was not brought by decedent's personal representative. It was brought by his widow and minor child. They did not bring it under the

Employers' Liability Act,[1] and could not have done so. They never had any right of action under the Employers' Liability Act. Obviously, therefore, this case did not "arise" under that Act.

Plaintiffs (decedent's widow and child) were citizens of California. The Southern Pacific Company was a citizen of Kentucky. The Pullman Company was a citizen of Illinois. The citizenship of the other defendants was not indicated. Between plaintiffs and the Pullman Company, there was a separable controversy, that is to say, a controversy which was wholly between them, and which could be fully determined as between them. Therefore, the case was removable[2] and, on the Pullman Company's petition, filed November 20, 1935, was duly and properly removed to the District Court of the United States.

On December 16, 1935, counsel for plaintiffs and counsel for some of the defendants stipulated that decedent's administratrix might be substituted as plaintiff in the place and stead of his widow and child. The administratrix was not a party to the stipulation. Nevertheless, on December 27, 1935, the District Court ordered that she be substituted as plaintiff. She paid no attention to the order. She never appeared, in the District Court or in this court. The substitution order was likewise ignored and disregarded by the original plaintiffs (decedent's widow and child) and by the District Court

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[1]45 U. S. C. A. §§51-59.

[2]Judicial Code, §28, 28 U. S. C. A. §71.

itself. The original plaintiffs were permitted to and did, thereafter as theretofore, prosecute the action in their own name. In permitting them to do so, the court, in effect, vacated and set aside the substitution order.

On January 22, 1936, the original plaintiffs filed a motion to remand the case to the State court. The motion was made on the wholly untenable ground that the District Court had no jurisdiction. It was not on the ground that the case was one arising under the Employers' Liability Act.[3] Even if made on that ground, it would not have been well founded, since, as previously shown, the case did not arise under the Employers' Liability Act. The motion was properly denied.

On December 21, 1936, the original plaintiffs, in consideration of $2,500 paid to them by the Southern Pacific Company, executed and delivered to that company a so-called "covenant not to sue," whereby they, the original plaintiffs, bound themselves "forever to refrain from instituting, pressing, or in any way aiding any claim, demand, action, or cause of action for damages . . . for, on account of, or in any way growing out of . . . the injury or death of [decedent]."

On December 23, 1936, in the probate court having jurisdiction of decedent's estate, the administratrix filed a petition stating that she, the administratrix, had filed this action for damages and had executed the above mentioned covenant. The statement was untrue. The administratrix had filed no action

[3] 45 U. S. C. A. §56.

and had executed no covenant. Her petition prayed for an order confirming the covenant and permitting her to dismiss this action as against the Southern Pacific Company. The probate court made such an order on December 23, 1936.

On December 24, 1936, the original plaintiffs filed in the District Court a motion for dismissal of this action as against the Southern Pacific Company and defendant Dolsen. The motion was granted, and a judgment dismissing the action as against the Southern Pacific Company and Dolsen was entered on December 28, 1936.

The case was tried on December 29, 1936. Judgment was entered on January 22, 1937. The judgment was against the original plaintiffs. It did not mention the administratrix. The original plaintiffs appealed from the judgment. The administratrix was not a party to the judgment, did not appeal therefrom, and is not before this court, as an appellant or otherwise.

I agree with, and adopt as my own, the trial court's opinion in this case.[4]

The judgment should be affirmed.

[Endorsed]: Opinion and dissenting opinion. Filed Apr. 19, 1938. Paul P. O'Brien, Clerk.

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[4]Jenkins v. Southern Pacific Co., 17 F. Supp. 820, 823. I reject, however, the inadvertent statement (17 F. Supp. 821) that the action was brought by decedent's widow, "for herself, as executrix of the estate of her deceased husband." There was no executrix. There was an administratrix, but she did not bring or prosecute this action.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 8558.

MRS. GARNETT V. JENKINS, et al.,

Appellants,

vs.

PULLMAN CO., et al.,

Appellees.

JUDGMENT.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellees, and that this cause be and hereby is remanded with directions to the said District Court to remand the cause to the state court.

It is further ordered and adjudged by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 19, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, June 3, 1938.

Before: Garrecht, Mathews and Haney, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITIONS FOR REHEARING.

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of The Pullman Company, filed May 18, 1938, and petition of A. J. Kash, filed May 28, 1938, within time allowed therefor by rule of court, or a valid extension thereof, for a rehearing of above cause be, and each of said petitions hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Livingston & Livingston and Leo E. Seivert, Esq., counsel for the appellees, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 18, 1938; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's

ffice of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated: San Francisco, California,
June 7, 1938.

[Endorsed]: Filed Jun. 7, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty-three (163) pages, numbered from and including 1 to and including 163, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of June A. D. 1938.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 165] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Robert Brennan. File No. 42,695. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 210. The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, petitioners, vs. Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, His Guardian ad Litem. Petition for a writ of certiorari and exhibit thereto. Filed July 18, 1938. Term No. 210, O. T., 1938.

(8419)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM—1938.

No. 210

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MEYERS, and A. J. KASH,

Petitioners,

vs.

MRS GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, his Guardian ad Litem,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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LEONARD J. BLOOM,
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Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

SUPREME COURT

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OCTOBER TERM—1938.

No. .....

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MEYERS, and A. J. KASH,

Petitioners,

vs.

MRS GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, his Guardian ad Litem,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, The Pullman Company, a corporation, and A. J. Kash, respectfully file and submit this as their petition for a writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

The Circuit Court of Appeals on April 19, 1938, by a divided court reversed a decision and judgment of the District Court of the United States for the Southern District of California, Central Division, in favor of petition-

ers herein and against respondents, 96 Fed. (2d) 405. Petitions for rehearing were later filed and were denied on June 3, 1938. [Tr. 162.] Mandate has been stayed by proper order [Tr. 162] and the cause is now filed and docketed herein for decision.

Summary Statement of the Matter Involved.

On September 27th, 1935, Mrs. Garnett V. Jenkins and Robert W. Jenkins, a minor, by Mrs. Garnett V. Jenkins, his Guardian *ad Litem*, widow and minor son of Robert L. Jenkins, deceased, commenced in the Superior Court of Los Angeles County, California, an action for the alleged wrongful death of said decedent, against the Southern Pacific Company, The Pullman Company, A. J. Kash, H. A. Hatch, and two fictitious defendants, John Doe One and John Doe Two. [Tr. 5.]

The complaint alleged that the deceased was a railroad conductor employed by the Southern Pacific Company, and on a certain date was "in charge of the train running between Los Angeles and San Francisco, in the State of California." [Tr. 8.] The Pullman Company owned and maintained certain sleeping cars comprising part of the train. Defendant Hatch was the Pullman conductor on the same train. John Doe One was the Pullman porter and John Doe Two was the railroad's gate tender at the passenger depot at Los Angeles. Kash was a passenger on the train.

It was alleged that the decedent Jenkins, "acting within the scope of his employment", [Tr. 8] was requested by Pullman conductor Hatch to assist him in quelling a disturbance on such train which was being created by Kash while in an intoxicated condition. Despite Jenkins' and

Hatch's efforts, Kash persisted in his conduct and Jenkins called the police at Ventura, California. While Kash was being taken from the train by the police, he struck Jenkins and the blow caused death. Kash was of course guilty of assault. The Southern Pacific Company and the gate tender, John Doe Two, were charged with negligence in permitting a disorderly person to board the train. It was alleged that The Pullman Company and John Doe One permitted a drunken and disorderly person to board a Pullman sleeper without a ticket. No negligence on the part of Hatch was alleged.[1]

A separate count charged Kash alone with the assault.

On November 20, 1935, The Pullman Company, an Illinois corporation, duly filed its notice of motion to remove the cause to the United States District Court, together with the usual petition and bond. [Tr. 31-33-37.] The grounds for removal were diversity of citizenship and a separable controversy. The fictitious defendants John Doe One and John Doe Two had not been served with process and no cause of action was alleged against the Southern Pacific Company or Hatch. On November 25, 1935, the petition for removal was presented to the state court which made its order duly removing the cause to

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[1]The opinion of the Circuit Court of Appeals first says that "The Pullman conductor and the Pullman porter permitted Kash to board the train." [Tr. 146.] This was alleged in the second amended complaint (filed after removal) but not in the original and first amended complaints. In these it was alleged only that it was the Pullman porter who permitted Kash to board the train. The error is corrected later in the opinion. [Tr. 9, 24, 61, 148.]

the United States District Court for the Southern District of California, Central Division. [Tr. 41.] On the same day, but after the petition for removal had been granted, an amended complaint was filed in the state court. [Tr. 18.] The plaintiffs in both the original and first amended complaint were the widow and minor son suing in their individual capacities as heirs. By stipulation and order thereon entered in the District Court December 27, 1935, Mrs. Garnett V. Jenkins, as administratrix of the Estate of Robert L. Jenkins, deceased, was substituted as plaintiff, instead of Mrs. Garnett V. Jenkins in her individual capacity and Robert W. Jenkins, by his Guardian *ad Litem*. [Tr. 47, 48.] After the record was lodged with the District Court, and on January 22, 1936, the plaintiffs filed a motion to remand to the state court. [Tr. 50.] While this motion to remand was pending and on February 8, 1936, the plaintiffs filed a second amended complaint in the District Court. [Tr. 55.] In this second amended complaint plaintiffs for the first time alleged negligence on the part of Hatch and brought the case against the Southern Pacific Company within the Employers' Liability Act. [Tr. 55.] On February 19, 1936, the District Judge denied the motion to remand. No exception was taken to this order.

Thereafter and on December 21, 1936, an instrument, denominated by the parties thereto as a covenant not to sue, was entered into between the plaintiffs and defendant Southern Pacific Company [Tr. 116] and Mrs. Jenkins, as administratrix of the estate of her deceased husband, applied for and obtained permission of the probate department of the state court to execute such instrument. [Tr. 122.] The Southern Pacific Company paid $2500.00 to

the plaintiffs therefor and plaintiffs filed with the District Court a dismissal of the action and obtained an order of dismissal from the District Judge. These facts were set up by the remaining defendants in supplemental answers. [Tr. 97, 99, 100.]

On December 29, 1936, the action was tried by the District Judge, a jury having been duly waived. [Tr. 102.] The supplemental answers above mentioned having raised the defense of a release of a joint tort feasor, that issue was tried as a plea in bar. The District Judge found that the Southern Pacific Company was a joint tort feasor with the other defendants and that it had been released. Since this necessarily released the remaining defendants judgment was ordered in their favor and duly entered. [Tr. 108.] The plaintiffs appealed to the Circuit Court of Appeals. [Tr. 128-131.] A majority of the Circuit Court, speaking through Circuit Judge Bert E. Haney, did not consider the merits of the plea in bar but held that the District Court should have remanded the case. It held that the subsequent amendments related back to the time of filing the original complaint [Tr. 155] and therefore the railroad company and the Pullman conductor should not be disregarded in determining the question of the removability of the case. It based its decision upon the contents of the *second amended complaint* which was filed after the case had been effectually removed to the District Court. The Court based its opinion upon the remand statute (28 U. S. C. A., Sec. 80; Judicial Code, Par. 37). Circuit Judge Mathews dissented, holding that the case had been properly removed and that the motion to remand was properly denied. He agreed with the trial judge that the release of the Southern Pacific Company released the remaining defendants.

Question Presented.

IN A CASE IN WHICH, ON THE COMPLAINT FILED IN A STATE COURT, A NON-RESIDENT DEFENDANT DULY EXERCISES ITS RIGHT OF REMOVAL, THE REQUISITE JURISDICTIONAL AMOUNT AND A SEPARABLE CONTROVERSY BOTH EXISTING, CAN THE PLAINTIFF BY AMENDING THE COMPLAINT IN THE DISTRICT COURT, SO AS, FOR THE FIRST TIME, TO STATE CAUSES OF ACTION AGAINST CO-DEFENDANTS, THEREBY OUST THE DISTRICT COURT OF JURISDICTION AND DEPRIVE THE NON-RESIDENT DEFENDANT OF ITS RIGHT OF REMOVAL AND RIGHT TO HAVE ITS CASE TRIED IN SUCH COURT?

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Jacobson v. Chicago, M. & St. P. R. Co.*, 66 Fed. (2d) 688, and the decision of the Tenth Circuit Court of Appeals in the case of *Mecom v. Fitzsimmons Drilling Co.*, 47 Fed. (2d) 28 (reversed on other grounds, 284 U. S. 183, 76 L. Ed. 233).

2. The Circuit Court of Appeals decided a question involving federal law and procedure in a way in conflict with the principles pronounced by this court in the cases of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, ... U. S. ....., 82 L. Ed. 541, 58 Sup. Ct. 586; and *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

3. The Circuit Court of Appeals has decided two important questions of federal law which have not been, but should be, settled by this Court:

A. It has held that, where a plaintiff brings in a state court an action under the Federal Employers' Liability

Act against a railroad company for the alleged wrongful death of an employee and in the same complaint joins therewith a cause of action under a state wrongful death statute against a non-resident defendant (not the railroad company) for damages on account of the death of such decedent, different acts of negligence being charged against each defendant, the non-resident defendant, though diversity of citizenship and the jurisdictional amount being present, cannot remove the action to the proper District Court.

B. It has held that, in a case in which, on the complaint filed in a state court, a non-resident defendant duly exercised its right of removal, the requisite jurisdictional amount and a separable controversy both existing, the plaintiff can thereafter by amending the complaint in the District Court so as, for the first time, to state a cause of action under the Federal Employers' Liability Act against a co-defendant oust the District Court of jurisdiction and thereby deprive the non-resident defendant of its right of removal and its right to have the case against it tried in the federal court.

Your petitioners present herewith as part of this petition a brief setting forth more fully their views upon the questions involved, and also a transcript of the record in the Circuit Court of Appeals.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the

record and all proceedings in said Circuit Court of Appeals in the said case therein entitled, "Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian *ad Litem*, Appellants, versus The Pullman Company, a corporation, H. J. Hatch, Edward E. Meyers and A. J. Kash, Appellees, No. 8558," to the end that said case may be reviewed and determined by this Court, and that the said judgment of the Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

THE PULLMAN COMPANY,
Petitioner;
By ROBERT BRENNAN,
LEO E. SIEVERT,
H. K. LOCKWOOD,
Counsel;

C. S. WILLISTON,
M. W. REED,
Of Counsel.

A. J. KASH,
Petitioner;
By DAVID LIVINGSTON,
LAWRENCE LIVINGSTON,
Counsel.

LIVINGSTON & LIVINGSTON,
LEONARD J. BLOOM,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(1) The Opinions and Decisions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed April 19, 1938, and is reported in 96 Fed. (2d) 405, and at page 144 *et seq.* of the transcript. It was written by Circuit Judge Bert E. Haney, Circuit Judge Francis A. Garrecht concurring and Circuit Judge Clifton Mathews dissenting. The opinion of the United States District Court (Judge Leon R. Yankwich) was filed January 22, 1937, and is reported in 17 Fed. Supp. 820. Petitions for rehearing were filed by The Pullman Company on May 18, 1938, and by A. J. Kash on May 28, 1938. These petitions were denied on June 3, 1938. [Tr. p. 162.]

(2) Jurisdiction.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code (28 U. S. C. A., Par. 347). The petition is filed in accordance with rule 38 of this Court.

(3) Statement of the Case.

A statement of the case will be found under the heading "Summary Statement of the Matter Involved" in the petition for writ of certiorari to which this brief is annexed. In the interest of brevity the statement will not be repeated.

(4) Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the plaintiffs by amending their complaint in the District Court so as, for the first time, to state a cause of action against the Southern Pacific Company under the Federal Employers' Liability Act and a cause of action against defendant Hatch under the state law, thereby *ipso facto* ousted the District Court of jurisdiction and compelled it to remand the entire case to the state court, despite the fact that The Pullman Company, a non-resident defendant, had duly exercised its right of removal.

2. The Circuit Court of Appeals erred in holding that where, in a complaint filed in a state court, a cause of action under the Federal Employers' Liability Act against a railroad company for wrongful death of its employee, is joined with a cause of action for the same death under a state statute against a non-resident defendant, diversity of citizenship and the jurisdictional amount being present, such non-resident defendant could not properly remove the case to the United States District Court.

3. The Circuit Court of Appeals erred in holding that the second amended complaint, filed in the District Court, wherein for the first time the plaintiffs alleged a cause of action under the Federal Employers' Liability Act against the Southern Pacific Company and a cause of action against defendant Hatch, so operated upon the record and related back to the date of filing the original complaint in the state court as to oust the jurisdiction of the District Court and compel it to remand the case.

4. The Circuit Court of Appeals erred in reversing the District Court and ordering it to remand the case to the state court thereby depriving The Pullman Company, a non-resident defendant, of its right to have the case against it heard and determined in the federal court.

(5) Summary of the Argument.

IN A CASE IN WHICH, ON THE COMPLAINT FILED IN A STATE COURT, A NON-RESIDENT DEFENDANT DULY EXERCISED ITS RIGHT OF REMOVAL, THE PLAINTIFF CANNOT BY AMENDING THE COMPLAINT IN THE DISTRICT COURT, SO AS, FOR THE FIRST TIME, TO STATE CAUSES OF ACTION AGAINST CO-DEFENDANTS, THEREBY OUST THE DISTRICT COURT OF JURISDICTION AND DEPRIVE THE NON-RESIDENT DEFENDANT OF ITS RIGHT OF REMOVAL AND RIGHT TO HAVE ITS CASE TRIED IN THE DISTRICT COURT.

In order to present the argument in support of the foregoing proposition logically and concisely, such argument falls into the following subdivisions:

1. At the time The Pullman Company's petition for removal was filed and presented to the state court, the case, as pleaded, was properly removable to the District Court.

2. The filing in the state court after the order of removal had been made of a first amended complaint did not destroy The Pullman Company's right of removal, and the said first amended complaint did not present a case which could not have been removed had said amended complaint been the original complaint.

3. The filing by plaintiffs of a motion to remand in the District Court merely required that court to examine the record as it existed in the state court at the time the

petition for removal was filed and determine whether or not the state court properly ordered the case removed.

4. The plaintiffs, by entering into a stipulation substituting Mrs. Jenkins, administratrix, as plaintiff in the place of herself and minor son, heirs, as plaintiffs and requesting the District Court to exercise its power by ordering such substitution thereby waived any right to ask that the action be remanded.

5. The plaintiffs, by filing a second amended complaint in the District Court, praying judgment therefrom, thereby abandoned all former pleadings, including the motion to remand, and the case stood as if at that moment it had then been filed in said District Court.

6. Even though the original complaint had contained all the allegations of the second amended complaint still The Pullman Company would have been entitled to remove the case to the District Court.

7. Once a case is properly removed to the District Court, subsequent amendments to the pleadings, adding a cause of action against another defendant, cannot oust the jurisdiction of the District Court.

8. The judgment of the Circuit Court is in conflict with the decisions of two other Circuit Courts of Appeal.

9. The judgment of the Circuit Court is at variance with principles of law pronounced by this Court.

10. The Circuit Court has ruled upon two important questions of federal law which have not but should be decided by this Court.

11. Had the Circuit Court considered the case on its merits, the judgment of the District Court would have been affirmed.

(6) ARGUMENT.

POINT I.

The Removal Was Proper.

The original complaint comprised two separately stated causes of action, in one count negligence of The Pullman Company was alleged and damages in the sum of $50,000.00 against it were prayed; in the other, the assault by Kash was pleaded and damages in the sum of $50,000.00 against him were prayed. [Tr. pp. 13-16.] This was proper and permissible under California law since the suit was by the heirs of decedent. California Code of Civil Procedure, 377; California Code of Civil Procedure, 427. The controversy between plaintiffs and The Pullman Company was separable from the controversy between the plaintiffs and defendant Kash. *Judicial Code,* Section 28, U. S. C. A. Title 28, Section 71. Therefore The Pullman Company, a non-resident defendant, was entitled to remove the case to the District Court.

Barney v. Latham, 103 U. S. 205;

Hyde v. Ruble, 104 U. S. 407, 409;

Salem Co. v. Manufacturers Co., 264 U. S. 182;

St. Paul Merc. Co. v. Red Cab Co., ... U. S. ....., 82 L. Ed. 541; 58 Sup. Ct. 586;

Kirby v. American Soda Fountain Co., 194 U. S. 141;

Travelers Assn. v. Smith, 71 Fed. (2d) 511;

Adderson v. Southern Ry. Co., 177 Fed. 571;

Murray v. So. Bell Tel. Co., 210 Fed. 925;

Hartman et al. v. N. Y. & Miami S. S. Co., 16 Fed. Supp. 479.

Although the Pullman conductor Hatch was named as a defendant in the first count, no cause of action was pleaded against him.

On a petition for removal, a defendant against whom no cause of action is stated will not be considered.

Cella v. Brown, 144 Fed. 742; certiorari denied 202 U. S. 620;

Chicago Co. v. Stepp, 151 Fed. 908;

Bryce v. Southern Co., 122 Fed. 709.

The two fictitious defendants were not served with process until long after the removal. They likewise were not to be considered at the time the removal was granted.

Community Co. v. Maryland Co., 8 Fed. (2d) 678; certiorari denied 270 U. S. 652;

Galehouse v. B. & O. R. Co., 274 Fed. 370;

Kelly v. Alabama Co., 34 Fed. (2d) 790.

The complaint alleged that the decedent was employed by the defendant, the Southern Pacific Company, as a conductor upon an intrastate passenger train. It was not alleged, directly or indirectly, that he was engaged in interstate commerce. Therefore no cause of action was stated against his employer, the Southern Pacific Company, even though it might be generally engaged in interstate commerce. On these allegations plaintiffs' sole remedy against the Southern Pacific Company was before the

Industrial Accident Commission of the State of California under its Workmen's Compensation Act. (Statutes of California, 1917, p. 831, as amended.)

Tipton v. A. T. and S. F. Ry. Co., 298 U. S. 141.

In order to plead a cause of action under the Federal Employers' Liability Act it must be affirmatively alleged that the employee was engaged in interstate commerce.

Illinois Central Co. v. Behrens, 233 U. S. 473;
Second Employers Liability Cases, 223 U. S. 1;
Brinkmeier v. Mo. Pac. R. Co., 224 U. S. 268.

Furthermore, the action was brought by the heirs as co-plaintiffs. No action can be maintained by the heirs under the Federal Employers' Liability Act, but it must be brought by the personal representative of the deceased for the benefit of the heirs.

45 *U. S. C. A.* 51, 59;
Missouri, etc. R. Co. v. Wulf, 226 U. S. 570;
St. Louis, etc. R. Co. v. Seale, 229 U. S. 156;
American R. Co. v. Birch, 224 U. S. 547.

It is therefore clear that The Pullman Company was entitled to remove the case to the District Court when it did, and the case was properly removed.

POINT II.

The First Amended Complaint Filed in the State Court Did Not Destroy the Right of Removal and Did Not Present a Non-Removable Case.

The petition to remove was filed in the state court November 20, 1935 [Tr. p. 36]; it was presented to the court November 25, 1935 [Tr. p. 40], and the state judge ordered the removal at 10 a. m. the same day [Tr. pp. 31-40-41]. Plaintiffs' first amended complaint was filed in the state court November 25th, at 2:46 p. m. [Tr. p. 30]. On the filing in the state court of a sufficient petition and bond, in a removable cause, the jurisdiction of the state court absolutely ceases, and that of the District Court attaches, regardless of any action thereon by the state court; and any further proceeding in the state court is *coram non judice.*

Kern v. Huidekoper, 103 U. S. 485, 490;

B. & O. R. Co. v. Koontz, 104 U. S. 5;

Madisonville Tr. Co. v. St. Bernard Mining Co., 196 U. S. 239;

Chesapeake & Ohio R. Co. v. McCabe, 213 U. S. 207.

Furthermore, the right to a removal can not be defeated by an amendment to the complaint after the petition and bond for removal have been filed.

Clarke v. Mathewson, 12 Peters 164, 165;

Kanouse v. Martin, 15 Howard 198;

George Weston Ltd. v. New York Cen. R. Co., 115 N. J. Law 564;

Woods v. Massachusetts Protective Assn., 34 Fed. (2d) 501;

Kelly v. Alabama Quenelda Graphite Co., 34 Fed. (2d) 790.

POINT III.

The Motion To Remand Tested Validity of Removal in Light of Record in State Court.

A motion to remand is properly determinable on the facts appearing on the face of the record.

Harrington v. Great Northern R. Co., 169 Fed. 714;

Jones v. Casey-Hedges Co., 213 Fed. 43 (citing *Kentucky v. Powers*, 201 U. S. 1-33-34);

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81;

West Side R. Co. v. California Pac. R. Co., 202 Fed. 331;

So. Carolina v. Coosaw Mining Co., 45 Fed. 804; affirmed 144 U. S. 550.

POINTS IV AND V.

Plaintiffs Waived Any Right of Remand.

The Federal Employers' Liability Act (Title 45, U. S. C. A., Sec. 56) provides in part:

"* * * Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, * * *."

The second amended complaint filed in the District Court relied upon the Federal Employers' Liability Act

as against the Southern Pacific Company and by the terms of the statute itself that court had jurisdiction over the action.

Santa Fe Central R. Co. v. Friday, 232 U. S. 694;

Farrugia v. Philadelphia, etc. R. Co., 233 U. S. 352.

An amended complaint served and filed by leave of court is a substitute for the original in all respects and the cause proceeds upon it the same as if it was the original and only one in the case.

Washer v. Bullit County, 110 U. S. 558.

By amending the complaint in the District Court after removal and by stipulating with the defendants, plaintiffs accepted the jurisdiction of the District Court, thereby waiving any right of remand.

In re Moore, 209 U. S. 491;

Hagerla v. Mississippi River Power Co., 202 Fed. 776;

Enders v. Supreme Lodge, etc., 176 Fed. 832.

It has also been held that the prohibition against removal found in the Federal Employers' Liability Act (U. S. C. A. Title 45, Sec. 56) may be waived.

Stephens v. Chicago, M. & P. S. R. Co., 206 Fed. 854;

Strother v. Union Pacific R. Co., 220 Fed. 731.

In the absence of an exception the ruling will not be reviewed on appeal.

Fleischmann v. U. S., 270 U. S. 349;

Northwest Theatres Co. v. Hanson, 4 Fed. (2d) 471;

Sacramento Co. v. Melin, 36 Fed. (2d) 907;

Aetna Co. v. Reliable Co., 58 Fed. (2d) 100;

Saunders System v. Kelley, 30 Fed. (2d) 520.

Plaintiffs' failure to except is not cured by their assignment of error.

Goldfarb v. Keener, 263 Fed. 357.

POINT VI.

Where, in a Complaint Filed in a State Court, a Cause of Action Under the Federal Employers' Liability Act Against a Railroad Company Is Joined With Another Cause of Action Under a State Statute Against a Non-resident Defendant (Not the Railroad Company) Such Non-resident Defendant Can Remove the Case to the District Court.

It will be noted that the foregoing statement precisely applies to the case at bar. Herein The Pullman Company was the removing defendant and is a different corporation than the Southern Pacific Company. The Pullman Company is not a common carrier, nor is it subject to the provisions of the Federal Employers' Liability Act.

Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84.

The decedent was not in its employ.

The case of *Goetz v. Interlake S. S. Co.*, 47 Fed. (2d) 753, clearly establishes our point. In that case plaintiff sued in a state court an employer, the steamship company, for the alleged wrongful death of a seaman, basing the case on the Jones Act (Title 46 U. S. C. A., Sec. 688) identical with the Federal Employers' Liability Act, and for the same death in the same action sought damages from the Bethlehem Steel Corporation as to whom he was a licensee.

The case was removed to the District Court where, in a well reasoned opinion, Woolsey, District Judge, held that it was properly removed. In the course of his opinion, after referring to the prohibition against removal found in the Federal Employers' Liability Act, Judge Woolsey said:

> "It seems to me, after a careful reading of many opinions which have been rendered in regard to the propriety of the removal of actions under Employers' Liability Act cases, that the prohibition was intended only to take from the defendant employer—perhaps in order to relieve the calendars of the federal courts—any choice of forum, and leave that choice wholly in the plaintiff employee under the provision for concurrent jurisdiction of the federal and state courts contained in the act.
>
> "Because of this provision for concurrent jurisdiction, however, it seems to me that a stronger argument can be made for trying the whole case in the federal court, than can be made in the usual instance where action is brought against a resident and a non-resident defendant and removed by the latter on the ground of separable controversy, of which Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, is the typical and authoritative example."

The foregoing appears to be the only case squarely passing upon the precise question.

There have been, however, many cases in the district courts dealing with a situation where, in one complaint against a single non-resident defendant, one cause of action under the Federal Employers' Liability Act has been coupled with a cause of action under a state statute or the common law and where the defendant has sought to remove the case from the state court.

Until the decision in the instant case, the case of *Jacobson v. Chicago, M. St. P. & P. R. Co.*, 66 Fed. (2d) 688, was the only decision of a Circuit Court of Appeals on the subject. In that case the Eighth Circuit Court of Appeals held that, although the plaintiff had brought suit against his employer, a railroad company, in one complaint, nevertheless there were set out two causes of action, one bottomed on the Federal Employers' Liability Act, and the other on the Montana statutes. The case was removed to the federal court, and in considering the contention that it had been improperly removed, the court said:

> "Federal courts have original jurisdiction in actions for injury to or death of railroad employees under the same conditions that determine their authority in other suits at law, and an action based upon the Federal Employers' Liability Act is manifestly a suit of a civil nature arising under the laws of the United States within the meaning of the Federal Judicial Code (Sec. 34 (28 USCA Sec. 41)), and hence is within the jurisdiction of the federal District Courts.

Assuming that the necessary diversity of citizenship exists, plaintiff might in the first instance have brought the action against defendant in the federal court. It cannot, therefore, be said that the court was inherently without jurisdiction to try the action. Actions arising under the Federal Employers' Liability Act, if brought in a state court of competent jurisdiction, are not removable to the federal court. The question of the removability of a cause of action is ordinarily to be determined by the federal court upon motion to remand. In the instant case, the federal court had jurisdiction notwithstanding the fact that the action may have been improperly removed, a question which we later consider, and the plaintiff failed to move to remand the case. This, we think, was a waiver of plaintiff's right, if he had such, to have the cause tried in the state court. But, quite aside from this conclusion, it is observed that plaintiff pleaded two causes of action. The cause of action based upon the Montana statutes was clearly removable, and, that being true, defendant properly removed the case to the federal court. (Citing cases.)

"The question was considered in Strother v. Union Pac. R. Co., *supra,* where, in a well-considered opinion by Judge Van Valkenburgh, it is said:

" 'If a cause of action arising under the federal act is coupled with one arising under a state statute or at common law, stated in the alternative in separate counts, the plaintiff preserving the right, under recognized rules of local procedure, to make his election and avail himself of either at the close of the evidence, the right of removal is presented more baldly at the threshold of the case. There is present at the same time a case arising under the federal act, and

therefore, standing alone, not removable, and one not arising under that act, and therefore, the citizenship being diverse, admittedly susceptible of being removed. Must the defendant await the action of the plaintiff at the close of the evidence before claiming the right, and, if so, is his relief then clear and complete? The Supreme Court has thus far refrained from settling such procedure, although it has intimated that the defendant should not necessarily be deprived of relief.

"'It rests with plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it.'

"These views so clearly stated by Judge Van Valkenburgh are in accord with our own, and we conclude that the lower court had jurisdiction to try the action."

There is a sharp and irreconcilable conflict among the decisions of the lower federal courts in such cases.

The following cases uphold such right:

Patterson v. Bucknall S. S. Lines, Ltd. (D. C.), 203 Fed. 1021 (S. D. New York 1913);

Stephens v. Chicago, etc. R. Co. (D. C.), 206 Fed. 854 (D. Idaho 1913);

Strother v. Union Pacific R. Co. (D. C.), 220 Fed. 731 (W. D. Missouri W. D. 1915);

Flas v. Ill. Central R. Co. (D. C.), 229 Fed. 319 (D. Nebraska 1916);

Bedell v. Baltimore & O. R. Co. (D. C.), 245 Fed. 788 (N. D. Ohio E. D. 1917);

Givens v. Wight (D. C.), 247 Fed. 233 (N. D. Texas 1918);

Goetz v. Interlake S. S. Co., et al. (D. C.), 47 Fed. (2d) 753 (S. D. New York 1931);

Maruska v. Equitable Life Assurance Soc. (D. C.) 21 Fed. Supp. 841 (D. Minn., 3d Div. 1938);

The following cases deny such right:

Ullrich v. N. Y. N. H. & H. R. Co. (D. C.), 193 Fed. 768 (S. D. New York 1912);

Rice v. Boston & M. R. R. (D. C.), 203 Fed. 580 (N. D. New York 1913);

Peek v. Boston & M. R. R. (D. C.) 223 Fed. 448 (N. D. New York 1915);

Jones v. So. Ry. Co. (D. C.), 236 Fed. 584 (N. D. Georgia 1916);

Mitchell v. So. Ry. Co. (D. C.), 247 Fed. 819 (N. D. Georgia 1917);

Reese v. So. Ry. Co. (D. C.) 26 Fed. (2d) 367 (N. D. Georgia 1928);

Thompson v. St. Louis-San Francisco R. Co. (D. C.), 5 Fed. Supp. 785 (N. D. Oklahoma 1934.)

We respectfully desire to attract the Court's special attention to the fact, however, that all of the foregoing cases, except that of *Goetz v. Interlake S. S. Co., et al., supra,* were cases in which, although two causes of action were stated in the complaint filed originally in a state court, there was but a single defendant in the case. In that respect, therefore, all of such cases, except the *Goetz* case, differ from the case at bar.

POINT VII.

Jurisdiction of the District Court Over a Case Properly Removed Can Not Be Ousted by Any Subsequent Amendment to the Pleadings or Any Change in Conditions.

This principle was announced in the early case of *Kanouse v. Martin,* 15 Howard 198, wherein it was said:

> "Without any positive provision of any Act of Congress to that effect, it has long been established, that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it."

Subsequently in the case of *Kirby v. American Soda Fountain Co.,* 194 U. S. 141, Mr. Chief Justice Fuller said:

> "In the second place, it is the general rule that when the jurisdiction of a circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions.
>
> * * * * * * * *
>
> "The jurisdiction thus acquired by the circuit court was not divested by plaintiff's subsequent action."

Finally in the recent case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, ... U. S. ....., 82 L. Ed. 541, 58 Sup. Ct. 586, this principle was exhaustively examined and re-affirmed. Mr. Justice Roberts emphatically points out that, but for this well settled and salutary principle, a defendant's statutory right of removal would be subject to plaintiff's caprice and that plaintiff ought out to be able to defeat this right and bring the cause back to the state court at his election. It was held that where the petitioner was entitled, on the face of the pleadings in the state court, to invoke the jurisdiction of the federal court, no subsequent amendment in the federal court could take away that right.

POINT VIII.

The Judgment of the Circuit Court Is In Conflict With the Decisions of Two Other Circuit Courts of Appeal.

Under Point VI, *supra*, we have referred to and discussed the case of *Jacobson v. Chicago, M. St. P. & P. R. Co.*, 66 Fed. (2d) 688 (8th Circuit). In the instant case the Circuit Court, in order to reverse the District Court, held that if plaintiffs' complaint, when filed in the state court, had stated a cause of action against the Southern Pacific Company under the Federal Employers' Liability Act, the Pullman Company, sued under a state law, would not have been entitled to remove. This holding is squarely in conflict with the *Jacobson* case, which holds that the coupling of a non-removable cause of action (under the

Federal Employers' Liability Act) with a removable cause of action does not prevent a removal.

The same principle was approved and adopted by the Tenth Circuit Court of Appeals in the case of *Mecom v. Fitzsimmons Drilling Co.*, 47 Fed. (2d) 28, reversed by this Court on other grounds, 284 U. S. 183. In that case two causes of action were united in one complaint filed in a state court from which a removal was effected. The Circuit Court held that one of the causes of action could not have been brought in the District Court, nor standing alone could it have been removed thereto. It also held that the other cause of action was removable. The Court said:

> "However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the cause of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf."

Thus it will be seen that the decision in the instant case is in direct conflict with the decisions of the Eighth and Tenth Circuit Courts of Appeal. Under Point VI, *supra*, we have shown the utter confusion and conflict on this point existing among the district courts. It is submitted that to allow this decision of the Ninth Circuit Court of Appeals to stand will further increase such confusion and conflict.

POINT IX.

The Judgment of the Circuit Court Departs From Principles of Law Pronounced by This Court.

Under Point VII, *supra,* we have demonstrated that this Court has announced and adhered to the rule that once the jurisdiction of the federal courts has attached by removal of a case thereto, a plaintiff can not, by amendment, divest the District Court of jurisdiction. The Circuit Court has here held that, although the Pullman Company was entitled to remove upon the state of the record in the state court, nevertheless the amendment in the District Court, pleading a cause of action under the Federal Employers' Liability Act against the Southern Pacific Company and a cause of action against the defendant Hatch, so related back to the date of filing in the state court as to divest the District Court of all jurisdiction. If such is to be the law obtaining in the Ninth Circuit, a non-resident's rights under the removal statutes will be lost and the jurisdiction of the federal courts in removed cases may be ousted by the whim, ingenuity or caprice of plaintiffs. We earnestly submit that this court should not tolerate such a departure from the principles which it has pronounced.

POINT X.

The Circuit Court Has Ruled Upon Two Important Questions of Federal Law Which Have Not Been, But Should Be, Decided by This Court.

1. The Circuit Court has held that the joinder of a cause of action under the Federal Employers' Liability Act with a removable cause of action in one complaint in a state court destroys the right of a non-resident defendant to remove to the federal courts the removable cause of action pleaded against it.

This question has not been decided by this Court. The Eighth Circuit has held to the contrary in the *Jacobson* case, *supra*. Well reasoned opinions of many District Courts have likewise held to the contrary. Other District Courts have arrived at the same conclusion reached in the instant case. The rights of litigants under two important federal statutes, the Federal Employers' Liability Act and the provisions of the Judicial Code governing removals, should in this case be finally determined by this Court.

2. The Circuit Court has decided that the ultimate pleading of causes of action under the Federal Employers' Liability Act against the Southern Pacific Company and under the state statute against the defendant Hatch in the District Court related back to the original filing in the state courts so as to destroy The Pullman Company's right of removal and oust the jurisdiction of the District Court.

This precise question has never been decided by this Court. The *St. Paul Mercury Indemnity* case, *supra,* held that a reduction of the amount in controversy below the jurisdictional requirement does not oust the federal jurisdiction once it has attached. By a parity of reasoning, even though this Court may hold that a removable cause of action can not be removed if joined with a properly pleaded cause of action under the Federal Employers' Liability Act, there would still remain the question we are now discussing. Of course, if this Court reverses the Circuit Court upon the first question under this point, the second question disappears. If the Circuit Court be sustained upon the first question, then this Court should answer the second question. It is respectfully urged that upon the authority of the *St. Paul Mercury Indemnity Company* case, *supra,* the Court must hold that plaintiffs' second amended complaint filed in the District Court did not so relate back as to destroy The Pullman Company's right of removal and oust the jurisdiction of the District Court. The question is of the utmost importance, for otherwise the jurisdiction of the federal courts in removed cases will always be uncertain and subject to ouster at any time before final judgment at the caprice of plaintiffs.

POINT XI.

Had the Circuit Court Considered the Case on Its Merits, the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U. S. 555, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals, the entire record is before this Court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court. The judgment and opinion of the District Court (17 Fed. Supp. 820) was correct and is approved by Circuit Judge Mathews in his dissenting opinion [96 Fed. (2d) 405, Tr. p. 157 *et seq.*]. In view of this Court's decision in the recent case of *Erie Railroad Co. v. Harry J. Tompkins,* ..... U. S....., 82 L. Ed. 787, decided April 25, 1938, we call attention to the fact that the decision of the District Court is in accord with the local law. The latest decision of the California courts on the subject is found in the case of *Lewis v. Johnson,* 93 Cal. App. Dec. 638, ... Pac. (2d) ....., decided May 27, 1938. This decision conclusively establishes that a covenant not to sue, coupled with a dismissal, constitutes a release.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court for the Southern District of California, Central Division, be affirmed, and the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed in order that justice may be done to petitioners; and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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Due service of the within Petition for Writ of Certiorari and Brief in support thereof is hereby acknowledged this.....day of July, A. D. 1938.

_____

_____

Counsel for Respondents.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 210.

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Petitioners,

vs.

MRS. GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, Guardian *Ad Litem*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER THE PULLMAN COMPANY.

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SUBJECT INDEX.

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SUPPLEMENTAL BRIEF OF PETITIONER THE PULLMAN COMPANY.

Foreword.

Feeling that the action of the Circuit Court of Appeals in reversing the judgment of the District Court and directing that the case be remanded to the state court on the asserted ground that the District Court was without jurisdiction to hear the case has been amply argued in petitioners' brief in support of their petition herein, and that further to discuss this angle of the case would be a mere work of repetition and supererogation, the petitioner, The Pullman Company, hereby elects to stand upon such brief to that extent.

In view, however, of the assumption that this court will, in the event of a reversal of the judgment of the Circuit Court, consider and pass upon the merits of the action and direct such disposition of the case as that court might and, we respectfully contend, should have made of it upon the appeal from the District Court, we desire herein further to discuss and elaborate Point XI of the argument in our former brief.

For the convenience of the court we here repeat such point and the argument thereunder as follows:

POINT XI.

Had the Circuit Court Considered the Case On Its Merits the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U. S. 555, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals, the entire record is before this court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court. The judgment and opinion of the District Court (17 Fed. Supp. 820) was correct and is approved by Circuit Judge Mathews in his dissenting opinion. [96 Fed. (2d) 405, Tr. p. 157 *et seq*.] In view of this court's decision in the recent case of *Erie Railroad Co. v. Harry J. Tompkins*, ... U. S. ....., 82 L. Ed. 787, decided April 25, 1938, we call attention to the fact that the decision of the District Court is in accord with the local law. The latest decision of the California

courts on the subject is found in the case of *Lewis v. Johnson,* 93 Cal. App. Dec. 638, 80 Pac. (2d) 90, decided May 27, 1938. This decision conclusively establishes that a covenant not to sue, coupled with a dismissal, constitutes a release.

Summary Statement of the Matter Involved.

On December 21, 1936, the plaintiffs executed and acknowledged a document entitled a "Covenant Not to Sue" and reading as follows:

> "The undersigned, Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem,* of the City of Los Angeles, County of Los Angeles, State of California, for our heirs, executors, administrators and assigns, in consideration of twenty-five hundred dollars ($2500.00) paid by Southern Pacific Company, a corporation, the receipt of which is hereby acknowledged, do by this instrument covenant with the said Southern Pacific Company, a corporation, and Fred M. Dolsen, forever to refrain from instituting, pressing or in any way aiding any claim, demand, action, or cause of action for damages, costs, loss of service, expense or compensation for, on account of, or in any way growing out of, or hereafter to grow out of, the injury or death of Robert L. Jenkins, deceased, husband of the said Mrs. Garnett V. Jenkins, and father of the said Robert W. Jenkins, occurring on the 29th day of March, 1935, or his said death on the 19th day of April, 1935, while in the employ of the said Southern Pacific Company, a corporation, as passenger conductor or otherwise, and running between various points and particularly on the 29th day of March, 1935, between Los Angeles, California, and San Luis Obispo, California, in which the said Robert

L. Jenkins claimed to have received a blow on the head from one, A. J. Kash, and it is alleged that the said Robert L. Jenkins, deceased, died as a result of said blow by the said A. J. Kash on the 29th day of March, 1935, or from any other injury or cause while in the employ of Southern Pacific Company, a corporation, or otherwise, which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins by Mrs. Garnett V. Jenkins, his guardian *ad litem*, plaintiff, vs. Southern Pacific Company, a corporation, *et al.*, No. 7421-Y, or from any cause or causes, whether set forth in said complaint as aforesaid or otherwise, or at any time from the beginning of the world to the date of this instrument, reserving to the undersigned all rights that they, or either of them, may now have or hereafter have against any other person or persons, firms or corporations, because of the death of the said Robert L. Jenkins, deceased.

"It is further agreed that the undersigned, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named, and it is further understood that said Southern Pacific Company, a corporation, does not in any manner or to any extent admit any liability or responsibility for the above claimed damages, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph herein specified.

"In Witness Whereof, the undersigned have hereunto set their hands this 21st day of December, 1936.

"Mrs. Garnett V. Jenkins
"and Robert W. Jenkins, by
"Mrs. Garnett V. Jenkins
"his guardian *ad litem*.

"State of California, County of Los Angeles—ss.

"On this 21st day of December, A. D., 1936, before me, L. H. Phillips, a Notary Public in and for said County and State, personally appeared Mrs. Garnett V. Jenkins, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

"In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) L. H. PHILLIPS
Notary Public in and for said County and State."
[Tr. p. 116.]

On December 23, 1936, the plaintiff, Mrs. Garnett V. Jenkins, as administratrix of the estate of Robert L. Jenkins, deceased, filed a petition in the state court probate proceedings stating that she, as administratrix, had filed an action predicated upon an injury to the deceased, and that such action had been removed to the District Court; and that she, as administratrix, had entered into a "Covenant Not to Sue" with the defendant Southern Pacific Company, a copy of which was attached. She prayed for an order confirming said covenant not to sue and permitting her to dismiss said cause as against the Southern Pacific Company. [Tr. p. 119.] On the same day the state court ordered that "the Covenant Not to Sue, entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be per-

mitted to dismiss said cause of action as against Southern Pacific Company, a corporation". [Tr. p. 122.]

On the following day, the trial court dismissed the action as against the defendant Southern Pacific Company and defendant Dolsen, the gate-tender.

On December 29, 1936, defendants The Pullman Company, Hatch, its conductor, Meyers, its porter, and Kash all filed supplemental answers alleging that the so-called "Covenant Not to Sue" released the cause of action stated against them. [Tr. pp. 97, 99, 100 and 103.] The answers were treated as pleas in bar, and trial was had thereon on the same day. The District Court held that the instrument amounted to a release of the cause of action as to all of the defendants. (*Jenkins v. Southern Pacific Company*, D. C. 17 F. Supp. 820.) As herein above stated, Circuit Judge Mathews, in a dissenting opinion agreed with and adopted as his own the trial court's opinion in the case. [Tr. p. 157.] The majority opinion of the Circuit Court failed to pass on the point.

The sole question on the merits is whether the above mentioned document characterized as a "Covenant Not to Sue" was such in fact and in legal effect, or whether such document, coupled with the dismissal and other attendant circumstances constituted a retraxit and release, and, as such, inured to the benefit of all the other joint tort-feasors.

It is noteworthy that the document in question was entered into while the action was pending and that therefore the entitlement thereof as a "Covenant Not to Sue" is meaningless and furnishes absolutely no aid in arriving at the intention of the parties thereto or the legal effect thereof. It is patently a misnomer and should be totally disregarded.

ARGUMENT.

POINT I.

The Document Entitled "Covenant Not to Sue" Was a Retraxit and a Release of Southern Pacific Company and Fred Dolsen, and as Such Effectuated a Release of All the Other Defendants.

The decision of the District Court in this case holding that the so-called "Covenant Not to Sue" inured to the benefit of all of the defendants is, we respectfully submit, in harmony with and fully supported by the decisions of the courts of the state of California.

The rule that a release of one joint tort feasor releases all joint tort feasors is elementary.

Kincheloe v. Retail Credit Co., 4 Cal. (2d) 21;
Bee v. Cooper, 217 Cal. 96.

In determining the effect of the instruments executed between the plaintiffs and defendants, Southern Pacific Company and Dolsen, all of such instruments must be considered as a part of one transaction. They were so treated by the parties. The documents include the so-called covenant not to sue, the petition for its confirmation, the order entered thereon, the dismissal of the action, and the court's order thereon.

As is pointed out in the opinion of the trial court:

"Any release, *retraxit* or abandonment of the cause of action made for a consideration against one joint tort feasor will release all others, whether it was the intention of the parties to do so or not. A mere covenant not to sue, which does not contain words amounting to a release of the cause of action or which nega-

> tives such release, is not effective for the purpose of releasing other joint tort feasors. (17 Fed. Supp. 820, 824-825.)"

It is stated in the opinion that although the so-called covenant did not use the word "release", it nevertheless was a release in legal effect.

The case of *Urton v. Prince,* 57 Cal. 270, closely resembles the one at bar. That was an action against one Price, a lecturer, and his sponsor, the Mechanics Institute, for injuries caused by the explosion of chemicals during a chemistry lecture. The plaintiff signed an instrument not unlike the one in the present controversy. In consideration of $500.00, plaintiff "for himself, his heirs, executors and administrators, released the Mechanics Institute from all causes of action, from the beginning of the world to the date of these presents" and particularly from claims arising from injuries "for which I brought suit No. 16,340 in the District Court of the Fourth Judicial District of California." Plaintiff then stipulated that the action be discontinued and dismissed as to the Mechanics Institute and a dismissal was thereafter entered. The court held that a joint tort feasor was relieved of all liability by virtue of the above instrument and the dismissal pursuant thereto. In that connection, the court said:

> "We entertain little doubt that the transaction was intended to constitute a satisfaction for all the injuries received by plaintiff. Whether so or not, the plaintiff, as appears from the finding of the jury and the release, has been fully compensated by the payment of a sum equal to all the damages he has suffered. He cannot recover more from anyone. 'It is to be observed' says Dr. Cooley in his work on the Law of Torts, p. 139, 'when the bar accrues in favor

of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that tne proceding assumes, but from the fact that the injured party has *actually received satisfaction*, or what in law is deemed the equivalent' " (page 272).

In the case of *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181, we find another case fully supporting petitioner's position. There, plaintiff sued Manson, Casey, Van der Naillen, and other former members of the Board of Public Works, to recover damages for negligence. Thereafter plaintiff and defendant Manson signed a contract whereby, in consideration of $250.00, plaintiff released Manson "from all claims and causes of action set forth in the complaint herein." As in the case at bar, the release sought to reserve plaintiff's rights against the other defendants. The action was dismissed as against Manson. When the case came to trial, the court held that the release of Manson discharged the remaining defendants, notwithstanding the saving clause. The court more readily reached this conclusion, it declared, since the demand, as here, was unliquidated. Therefore, any payment, however small, in consideration of a release, constituted compensation for the alleged injuries. The attempted reservation of rights against others was held ineffective as being repugnant to the legal effect and operation of the release.

A very clear statement of the law in California is contained in *Chetwood v. California National Bank*, 113 Cal. 414, 45 Pac. 704, in which a judgment was involved, awarded against several persons, and arising out of a tort. Some of the persons paid a sum of money and the

cause was dismissed as to them. The question with which the court was confronted was whether the payment was made upon the judgment, as the release was, doubtless, in consideration of that payment.

The Supreme Court of California, Mr. Justice Henshaw writing the opinion, used the following pertinent language:

> "Where a joint action is brought against two or more for trespass done, and all are held liable, the judgment must be for joint damages. All legal consequences of a joint judgment must follow. Each is liable for all the damage which the plaintiff has sustained, without regard to their different degrees of culpability, and a release to one discharges all."
>
> "The plaintiff in this case, by accepting $27,500 from the two defendants for and on account of the joint trespass of the three, and by releasing them, has released his claim against the third. In Urton v. Price, 57 Cal. 270, an action for personal injuries occasioned by the explosion of chemicals, was brought against Price, the demonstrator at a lecture. The charge was negligence. Thereupon plaintiff added the Mechanics' Institute, under whose direction the lecture was given, as a defendant. Subsequently plaintiff filed a stipulation discontinuing and dismissing the action as to the defendant the Mechanics' Institute. Thereafter the defendant Price filed an amended answer, setting forth that, after the commencement of the action, plaintiff had accepted $700 from the Mechanics' Institute for and on account of the injury he had received, and had dismissed the suit as to the institute. Judgment was entered in the trial court that plaintiff had received satisfaction for his injuries, and, upon appeal to this court, it was held that this constituted a release of plaintiff's claim against Price."

"In Tompkins v. Clay Street Hill R. R. Co., 66 Cal. 163, 4 P. (1165) 1167, plaintiff sued the Sutter Street Railroad Company and the Clay Street Hill Railroad Company for damages for personal injury, alleging that it was occasioned by their joint negligence. The court refused to instruct the jury as follows:

"'The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant the Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant the Clay Street Hill Railroad Company.'"

The court reversed the judgment on the ground that the trial court should have given this instruction, because a question of fact was involved, *i. e.*, whether the circumstances showed a release.

There is another significant paragraph in this opinion:

"While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite

obvious. *By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong.* It matters not either whether the payment was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all." (Italics added.)

Bogardus v. O'Dea, 105 Cal. App. 189, 287 Pac. 149, 150, was a retraxit case, in which a person, who had been named as a defendant but had not been served, paid a sum of money, after which a retraxit of the action was filed as to him. The court held that the retraxit was a release of all the defendants joining in the commission of the particular act, saying:

"The original complaint set up two distinct causes of action without attempting to state them separately. One of the causes of action so pleaded was for damages alleged to have been suffered by appellant as a result of the 'false and fraudulent representation and return' as to service of summons upon him, made, as the complaint alleged, 'with intent to deceive in order to obtain said default judgment.' According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort—giving rise to this cause of action, and hence a retraxit of *the cause of action in favor of any of them operated as a release of all of them.*" (Italics added.)

Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181, 183. is another case in which the court held that the dismissal was the result of the settlement of the controversy, and released all the defendants, despite the fact that the contract contained a proviso to the effect that it was not the

intention to release "anybody else" from liability. Said the court:

> "Such a provision, says the court in Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504, 'is simply void as being repugnant to the legal effect and operation of the release itself.' So is Seither v. Philadelphia Traction Co., 125 Pa. 397, 17 A. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905, where a reservation in a release similar to the one here was considered, the court said that the plaintiff having received one satisfaction was not entitled to a second. Each joint tort-feasor 'being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole wrong and as a discharge of all concerned. One defendant cannot make an agreement impairing the legal rights of his codefendants nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to the action."

Bee v. Cooper, 217 Cal. 96, was an action for misappropriation or unlawful expenditures of moneys, against several corporate directors. Pending the action, the plaintiff accepted a sum of money from some of the directors, and agreed to dismiss the action as to them. It was argued that the agreement was merely an agreement *not to sue*. The state Supreme Court sustained Judge Yankwich who was then a judge of the Superior Court of the State of California, in and for the County of Los Angeles, and before whom the case was tried, in holding that the instrument disclosed very definitely that it was the intention of the parties thereto to settle fully, compromise, and dismiss the cause of action sued on, as to certain defendants. The dismissal, the court held, was on the merits

and was intended to settle the differences and obligations between the parties, growing out of the cause of action set forth in the complaint.

In his opinion in the trial court in the case at bar, Judge Yankwich said: "I think the instrument under consideration has more of the earmarks of a release than the one which was before me in Bee v. Cooper, *supra*, and comes clearly within the principles laid down in that case and the other cases discussed." (17 Fed. Supp. 820, 830.)

The latest decision of the California courts in which the rule for which we contend has been followed is found in the case of *Lewis v. Johnson*, 93 Cal. App. Dec. 638, 80 Pac. (2d) 90, decided May 27, 1938, cited on page 31, under Point XI, of our brief in support of the petition herein.

That action was one against several joint tort feasors, and, during the course of the trial, the plaintiff, in consideration of $6000 paid to him by one of the defendants, executed and delivered to such defendant an instrument entitled "A covenant not to sue and covenant not to sue further". As in the case at bar, a dismissal was entered as to such defendant and also like the case at bar, the instrument there involved also attempted to reserve a cause of action against the remaining defendants.

The District Court of Appeal affirmed the judgment of the trial court in holding that each of the elements necessary for a *retraxit* were present in the case and that the attempted reservation was ineffectual and void. Citing among other California cases, *Bogardus v. O'Dea*, *Flynn v. Manson* and *Tompkins v. Clay Street R. R. Company*, *supra*.

The Supreme Court of the State of California has granted the petition of the plaintiff for hearing after decision by the District Court of Appeal, and the case is now under submission in the former court.

POINT II.

The rule established by the foregoing decisions of the courts of the state of California and followed by the District Court in the case at bar, is, we respectfully submit, controlling in this court:

Erie Rd. Co. v. Harry J. Tompkins, ... U. S. ....., 82 Cal. Ed. 787, dated April 25, 1938.

Conclusion.

It is therefore respectfully submitted that upon the authority of *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, cited under Point XI, this court should, for the foregoing reasons, reverse the judgment of the United States Circuit Court of Appeals, for the Ninth Circuit, and affirm the judgment of the District Court for the Southern District of California, Central Division.

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Due sevice of the within Supplemental Brief is hereby acknowledged this.....day of November, A. D. 1938.

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Attorneys for Respondents.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 210

THE PULLMAN COMPANY (a corporation), H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Petitioners,

vs.

MRS. GARNETT V. JENKINS and ROBERT W. JENKINS, by Mrs. Garnett V. Jenkins, Guardian Ad Litem,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONER, A. J. KASH.

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SUPPLEMENTAL BRIEF FOR PETITIONER, A. J. KASH.

STATEMENT OF THE CASE.

On April 19, 1938, the majority of the Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the Federal District Court in this action, and ordered the cause remanded to the State Court for lack of Federal jurisdiction (96 Fed. (2d) 405; Tr. p. 144). The merits of

the appeal received no consideration. For this reason, the petition for certiorari was almost entirely concerned with the question of jurisdiction. We believe that the supporting brief adequately covers this question.

REASON FOR FILING THIS BRIEF AND SCOPE THEREOF.

The Pullman Company has filed a supplemental brief on the merits. We concur in the views expressed therein. However, we find it necessary to file this brief on behalf of petitioner Kash, because we look at this case from a slightly different viewpoint. We believe that the appeal is disposed of by one very simple statement, viz.: that there was a dismissal for a consideration; that such dismissal is a retraxit of the cause of action and effectually disposes of the entire controversy. In addition, there is one point which concerns petitioner Kash alone. It is that he and the other defendants were joint tort feasors, so that a release of the Southern Pacific Company and Dolsen released Kash.

In the brief in support of the petition for certiorari the only statements made concerning the effect of the dismissal were, first, that Circuit Judge Mathews, the only Circuit Judge who considered the case on the merits, adopted the opinion of District Judge Yankwich and held that there had been a release of a joint tort feasor; second, that the most recent California decision on the subject had conclusively sustained the views of these two judges (*Lewis v. Johnson*, 93 Cal. App. Dec. 638, 80 Pac. (2d) 90). Since our supporting

brief was filed, the Supreme Court of California has granted a hearing of *Lewis v. Johnson*, so that this decision is again at large. However, the *Lewis* case does state the law of California, which must be applied to the case at bar. On the other hand, the fact that the *Lewis* case has been reopened necessitates a further consideration of the question whether there was a release of a joint tort feasor. We will also argue the corollary proposition that Kash and the Southern Pacific Company were joint tort feasors.

STATEMENT OF THE FACTS.

On September 27, 1935, Mrs. Garnett V. Jenkins and Robert W. Jenkins, respectively the widow and son of Robert L. Jenkins, deceased, commenced this action against the Southern Pacific Company, The Pullman Company, A. J. Kash, H. J. Hatch, and two John Does (Edward E. Myers and Fred M. Dolsen). The case was thereafter removed to the Federal District Court, and two amended complaints were filed. The first count of the various complaints alleged "a cause of action against the defendants and each of them" (Tr. p. 55), charging that Southern Pacific Company, The Pullman Company, Myers and Dolsen negligently permitted Kash to board a train in a drunken condition, and that Kash deliberately assaulted the deceased, thereby causing his death (Tr. pp. 55-64). The second counts were against Kash alone, charging him with the same assault (Tr. pp. 64-68). In the prayer plaintiffs asked judgment "on their first cause of action against the defendants and each of them" for the sum of $50,000.00, and on their second cause of action,

against Kash alone, for the same amount (Tr. p. 68). Issue was joined and the case was set for trial.

Upon the day set, defendants The Pullman Company, Hatch and Myers pleaded in bar that plaintiffs and Southern Pacific Company had entered into an agreement under which the cause of action pleaded in the complaint had been compromised and settled and the Southern Pacific Company released, and that this settlement and release likewise released the answering defendants. Kash filed substantially the same plea, but alleged additionally that the action had been voluntarily dismissed as to defendants Southern Pacific Company and Dolsen for the sum of $2500.00, and that this dismissal released all defendants. Kash further stated that the money had been paid as compensation for the death of Robert W. Jenkins by defendants Southern Pacific Company and Dolsen and that in consideration of said payment plaintiffs had voluntarily dismissed the action (Tr. pp. 97-103).

It was then stipulated that the court should forthwith take evidence on the pleas in bar (Tr. p. 116). Defendants thereupon offered in evidence four documents, all of which had been executed after the commencement of the action (Tr. pp. 116-124). These were: (a) a so-called covenant not to sue, (b) a petition in the Probate Court for confirmation of this document and for the leave to dismiss the action as against the Southern Pacific Company, (c) a probate order confirming the settlement agreement and the dismissal, and (d) a dismissal signed by plaintiffs' attorneys, reading as follows:

> You will enter the dismissal of the above action against the defendants Southern Pacific Company and Fred M. Dolsen. (Tr. p. 123)

Upon this dismissal the District Judge had endorsed an order reading:

It is so ordered: Leon R. Yankwich, Judge (Tr. p. 124). *No evidence was offered by plaintiff.* The court sustained the pleas in bar and the action was dismissed.

ARGUMENTS OF PETITIONER KASH.

Point I.

The dismissal for a valuable consideration, signed by counsel for the plaintiffs and by the District Judge, constituted a retraxit of the cause of action, and was therefore a release of all defendants.

Point II.

All of the defendants named in the complaint were joint tort feasors.

POINT I.

THE DISMISSAL FOR A CONSIDERATION WAS A RELEASE OF A JOINT TORT FEASOR. THIS RELEASED ALL DEFENDANTS.

While the action was pending, the Southern Pacific Company and Dolsen paid plaintiffs $2500.00 and plaintiffs signed a voluntary dismissal. The District Judge likewise dismissed the action. Although there were other preliminary steps, such as the covenant not to sue and the approval of the Probate Court, they all culminated in a dismissal by court and counsel executed for a valuable consideration.

The order of the District Judge distinguishes this case from the ordinary case, wherein the plaintiff files a voluntary dismissal pursuant to Subdivision (1) of Section 581 of the California Code of Civil Procedure. A dismissal signed by the judge is a dismissal with prejudice, or a retraxit. This is demonstrated by contrasting *Chetwood v. California National Bank*, 113 Cal. 414, wherein the judge signed an order of dismissal and a judgment thereon was entered, with *Lamb v. Herndon*, 97 Cal. App. 193, wherein there was a mere request for dismissal signed by plaintiff's attorney. The former was held to be with prejudice and the latter was held to be without prejudice.

However, far more important than the *form* of the dismissal, is the fact that money was paid for it pursuant to a settlement agreement. Such a dismissal is not the equivalent of a discontinuance, non-suit, or voluntary dismissal without prejudice.

> A judgment of dismissal entered into by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, *barring another action for the same cause*, being in effect *a retraxit*.[1]
>
> 34 *Corpus Juris* 787.

A dismissal for a consideration is a retraxit, and a retraxit in turn is a release. Therefore the dismissal effectually terminated plaintiff's action as against all joint tort feasors.

These rules are firmly established in California. Thus in *Urton v. Price*, 57 Cal. 270, an action was brought

1. Italics throughout are the writer's.

against Price, a lecturer, and his sponsor, the Mechanics' Institute, for injuries caused by a chemistry lecture explosion. During the pendency of the action, plaintiff, for a consideration of $500, signed an instrument similar to the so-called convenant not to sue in the case at bar, and filed a stipulation that the cause had been settled and that the action was discontinued and dismissed as to the Mechanics' Institute. A judgment of dismissal was thereafter entered. The court held that Price, the joint tort feasor, was released from liability.

In *Chetwood v. California National Bank*, 113 Cal. 414, an action was pending against three joint tort feasors. Two of them paid plaintiff the sum of $27,500, and plaintiff executed a stipulation wherein plaintiff

> • • • hereby renounces and withdraws his cause of action herein as against the said defendants, and that *he will not further prosecute the same;* • • • That, pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, *this action be, and is hereby, dismissed against the said defendant.* (p. 423)

An order of dismissal was filed and judgment entered thereon. The California Supreme Court held that the third joint tort feasor was released by the stipulation and dismissal. The court said:

> While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where sev-

> eral joint tort feasors have been sued in a single action, *a retraxit of the cause of action in favor of one of them operates to release them all.* The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all.
>
> In the case at bar it is disclosed that, after the court had awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of them the sum of twenty-seven thousand five hundred dollars for and on account of the injury and loss which the the corporation had sustained, *and a judgment of dismissal in their favor was accordingly entered. That this judgment, entered under the stipulation of the parties, was equivalent to a retraxit there can be no doubt under the case of Merritt v. Campbell,* 47 Cal. 542. (pp. 426, 427)

Flynn v. Manson, 19 Cal. App. 400, was a case in which plaintiff, in consideration of $250, signed a settlement agreement with one of the defendants, after which a judgment of dismissal was entered in favor of that defendant. The case is important because the agreement sought to reserve plaintiff's cause of action against the other defendants, in the same manner as the so-called covenant not to sue in the case at bar. The court held that such a reservation was repugnant to the legal effect of the

transaction, and that all the joint tort feasors were released.

Bogardus v. O'Dea, 105 Cal. App. 189, was an action against three joint tort feasors for false representations. Plaintiff had dismissed the action as against two of the defendants. Since the appeal came up on the judgment roll alone, the upper court presumed that the dismissal was for a consideration (p. 193). The court held:

> According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort, giving rise to this cause of action, and hence a retraxit of the cause of action in favor of any of them acted as a release of all of them. (p. 192)

In *Johnson v. Pickwick Stages,* 108 Cal. App. 279, plaintiff voluntarily dismissed the action as against one of the joint tort feasors, but since no consideration was given for the dismissal, it was held to be a mere without prejudice dismissal, and not a retraxit. However, the court said:

> If the dismissal had been entered in consideration of the payment to Johnson by Snyder of any sum as compensation for his injuries, it would operate as a retraxit and would bar his right to proceed against the appellant. The proof offered fell short of this. (p. 285)

In *Abbott v. Goodyear Tire Co.,* 116 Cal. App. 665, the dismissal was based upon a stipulation with the respondents, wherein the defendant agreed to pay $3000 if respondents failed to recover judgment against another defendant. A judgment was recovered and the court therefore held that no consideration was paid for the dismissal. But the court said:

> No consideration was paid for the dismissal. This promise of the tire company was not accepted by respondents in full or any satisfaction of the injuries • • • and the dismissal of the company was nothing more than an agreement not to sue which is not alone a release of either joint tort feasor • • •. If the dismissal had been entered in consideration of the payment to respondents of any sum as compensation for the injuries, it would have barred their right to proceed against appellant. (Johnson v. Pickwick Stages, supra.) (p. 669)

Bee v. Cooper, 217 Cal. 96 was an appeal from a judgment of Judge Yankwich when he was sitting on the California Superior Court. While the action was pending, plaintiffs entered into a "settlement agreement" with some of the defendants,

> • • • whereby in consideration of said five defendants paying over to a trustee the respective portions or percentage of the money and other property received by them • • • the plaintiff agreed to settle and dismiss this action as to said defendants. (p. 99)

The action was thereafter dismissed as to these defendants.

The exact language of the agreement was as follows:

> As and when any of said parties of the second part (defendants) shall pay or deliver to said trustee that which is required of him hereunder *this action shall be dismissed* as to such party, but nothing herein contained shall in any manner prejudice the prosecution of said pending action or of any other action against any other defendant herein or against any other person who may be liable on account of the matters therein complained of. (p. 100)

This is nothing more than a covenant to dismiss without prejudice. In our case Judge Yankwich said concerning the document in *Bee v. Cooper:*

> I think the instrument under consideration has more of the earmarks of a release than the one which was before me in Bee v. Cooper, supra, and comes clearly within the principles laid down in that case and other cases discussed. (17 Fed. Supp. 820-830)

The California Supreme Court held:

> The dismissal was on the merits and intended to settle the differences and obligations between the parties growing out of the cause of action set forth in the complaint. It is well settled that a release of one or two or more joint tort feasors operates as a release of all. (pp. 99, 100)

On May 27, 1938, the California District Court of Appeal decided the case of *Lewis v. Johnson,* 93 Cal. App. Dec. 638. We take the liberty of analyzing this opinion at some length, not only because it is the most recent pronouncement of a California court on this subject, but also because the facts are almost identical with those of the case at bar. *Lewis v. Johnson* was a malpractice action wherein plaintiff joined as defendants the two doctors who treated him, the hospital in which he was treated, and the superintendent of nurses of the hospital. During the pendency of the action, plaintiff, in consideration of the payment of $6000, entered into a so-called "covenant not to sue and covenant not to sue further" with the hospital and superintendent. The language of this covenant is almost identical with that of the settlement agreement in the case at bar, even to the statement that "the undersigned does not in any manner or respect waive or relinquish any claim or claims" against other parties (p.

640). Thereupon plaintiff's attorney requested the clerk to enter a dismissal of the action against the two defendants, and in open court announced that such a dismissal had been filed (our case has the additional feature of a judgment of dismissal ordered by the judge). The court held that there was a retraxit of the cause of action and that the remaining defendants were released. It stated:

> It is clear that each of the elements necessary for retraxit are present in the instant case. Plaintiff's attorney, Mr. Fritz, in open court, after the action had been commenced, voluntarily dismissed the cause of action against the defendants Seaside Hospital of Long Beach and Miriam Furlong. The document denominated "Covenant Not to Sue and Covenant Not to Sue Further" is mere surplusage, in view of the uncontradicted evidence which discloses that all of the elements necessary for a retraxit were present (p. 642).

The court further said:

> The attempted reservation of a cause of action against the remaining defendants was ineffectual and void. It is settled that a retraxit as to one joint tort feasor releases all of the joint tort feasors. (Bogardus v. O'Dea, 105 Cal. App. 189) • • • irrespective of the attempted reservation of a cause of action against some of the tort feasors, and regardless of the intention of the parties (Flynn v. Manson, 19 Cal. App. 400, 403) (p. 642).

In the case at bar, Judge Yankwich demonstrated that the settlement agreement and other documents also evidenced a release. Such a holding was unnecessary. Regardless of what documents were signed or what attempted reservations there may have been, there was an order

of dismissal and a dismissal for a consideration. This constituted a retraxit or release. Therefor any settlement documents were either mere surplusage or an ineffectual effort to escape the legal effect of a retraxit.

POINT II.

ALL OF THE DEFENDANTS WERE JOINT TORT FEASORS.

District Court Judge Yankwich pointed out in his opinion that the first count of the second amended complaint (Tr. p. 55) was against all the defendants, including defendant Kash. The violations of duty consisted of the negligent failure of the defendants, with the exception of Kash, to stop a drunken man from boarding the train and conducting himself in a tortious manner, and the alleged assault by defendant Kash. Thus the cause of action was based on the concurrence of different wrongful acts producing a single, indivisible injury. Furthermore, the first count alleged "a cause of action against the defendants and each of them" and the prayer of this count was likewise "against the defendants and each of them" (Tr. pp. 55, 68). Judge Yankwich, therefore, concluded:

> While there is a different violation alleged as to each of the several defendants, the cause of action is based upon the same assault upon the deceased. The cause of action is stated jointly against all of the defendants, and the death which resulted is traceable to the acts of all. (17 Fed. Supp. 820, 823)

The second count was an action of assault against Kash alone, and was joined with the first count under California Code of Civil Procedure Sections 379, 379a, 379b.

The same amount of damages was asked under both counts. The ~~record~~ second count was held by the District Judge to be a mere restatement as to Kash of the identical tort set forth in the first count. The court said:

> There is no negligence charged in the second cause of action, as Kash is charged merely with the doing of a certain act—assault. The first cause of action is based upon the same assault. But the defendants are tied to it by allegations of failure to do certain acts, or failure to prevent the assault. Each party is sought to be held because there was an assault of one man, for which the others became liable.
>
> We have exactly the same situation as in an automobile accident, wherein the driver of an automobile does a negligent act, and that negligence is imputed to the owner of the automobile because he is the owner or has allowed the driver to drive the car. However, it is still the same cause of action. I think therefore, that there is but one cause of action and that several parties contributed to it in various manners. But what determines the joint, or joint and several liability, is the fact that it arises out of a single state of facts, to which each of the defendants is related, in some manner, some as employers, some as agents or employees, some as common carriers, and some in other or different capacities. The situation is akin to other joint torts, such as libel. The person who composes the libel is liable because he wrote it; the editor of the newspaper which prints the libel is liable because he permitted it to be published, as is also the owner of the newspaper. Still there is *one* joint or joint and several liability, although each may be held liable upon a different theory of liability.
>
> My summary of the pleading would be that the theory of liability differs as between the several de-

> fendants, some being held on one theory, and some on another, but that the cause of action is essentially the same, that is, a tort. A tort indulged in by one person and for which the others are sought to be bound by reason of their failure to prevent it when it was their duty to do so. Ultimately, the assault is the basis of the right of action. And that was, of course, the same in both causes of action. (17 Fed. Supp. 823, 824)

One quotation from a recognized authority should suffice to demonstrate the correctness of this holding. We quote from Cooley on Torts, 4th Edition, p. 279:

> The rule seems to have become generally established that, although there is no concert of action between tort feasors, if the cumulative effect of their acts is a single, indivisible injury, which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort feasors.

The authorities are uniform to the effect that where several defendants so act as to cause a single injury, although there is no unity of action, they are jointly liable for the resultant damage. It is not necessary that the wrongful acts shall be contemporaneous.

> It is well established law that the original wrongful act may be so continuous that the action of a third person precipitating the disaster will in law be regarded as not independent but as joining with the original act to produce the accident. (Citing cases.) The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other, for it is well settled that the negli-

gence complained of need not be the sole cause of the injury.

Sawdey v. Producers Milk Co., 107 Cal. App. 467, 480.

Two entirely independent acts which result in injury may constitute the actors joint tort feasors. Thus in *Hillman v. Newington*, 57 Cal. 56, the plaintiff was entitled to the flow of 400 inches of water. The defendants severally diverted water from the stream so that plaintiff's flow was diminished to a quantity less than 400 inches. Although the appropriation of each defendant was insufficient to cause such diminution, the court nevertheless held that the defendants were joint tort feasors and could properly be joined as defendants in one action.

> Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly. (p. 64)

In *Merrill v. Los Angeles G. & E. Co.*, 158 Cal. 499, a gas company was charged with negligence in repairing a leak. Another defendant was charged with negligence because of the manner in which a stove was lighted by him. The two were held to be joint tort feasors.

So in the case at bar, Kash is charged with assault and the other defendants are charged with negligence in placing the deceased in a position in which the assault might occur. The two wrongs concurred to cause the decedent's death. If there had been no negligence in

permitting Kash to board the train the deceased would not have died. If there had been no assault by Kash, the deceased would not have died. The acts and neglects which caused the death necessarily and proximately contributed to the unfortunate result. Therefore all of the defendants were joint tort feasors.

CONCLUSION.

It is conclusively established in the law of California that:

(1) A judgment of dismissal, or a dismissal for a consideration, is a retraxit, and a retraxit is a release inuring to the benefit of all joint tort feasors.

(2) Where the acts of several defendants combine to cause a single, indivisible injury, such defendants are joint tort feasors.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 23, 1938.

Respectfully submitted,

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Attorneys for Petitioner,
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Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of November, 1938.

_____

Attorney for Respondents.

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Attorneys for Petitioners.
The Pullman Company, H. J. Hatch
and Edward E. Myers.

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 210

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Appellants,

vs.

MRS. GARNETT V. JENKINS and ROBERT L. JENKINS, by MRS. GARNETT V. JENKINS, Guardian *Ad Litem*,

Respondents.

RESPONDENTS' REPLY BRIEF.

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Parker & Baird Company, Law Printers, Los Angeles.

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TABLE OF AUTHORITIES CITED.

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RESPONDENTS' REPLY BRIEF.

STATEMENT OF THE CASE.

This is an action to recover damages for the wrongful death of Robert L. Jenkins, a passenger conductor employed by the Southern Pacific Company, a railroad corporation. On March 29, 1935, he was in charge of a train known as "The Lark." Somewhere between Oxnard and Ventura, California, he received an urgent call from the Pullman conductor of said train, H. J. Hatch, one

of the appellants herein, to quell a disturbance in the sleeping car. This disturbance was caused by one A. J. Kash, also an appellant herein, who, being very intoxicated, was in a quarrelsome and fighting mood, uttering obscenities, annoying the women passengers and, in general, being extremely objectionable. Although repeatedly requested by Hatch and Jenkins to desist, Kash refused to cease his objectionable conduct and Jenkins, in his capacity as conductor of the train, called upon the Ventura police to eject Kash. Police officers boarded the train and proceeded to lead Kash off the train, but as they were doing so, Kash turned and struck Jenkins a severe blow on the head. The force of the blow caused a hemorrhage of the right frontal lobe of the brain, together with sub-dural hemorrhage and, as a result thereof, Jenkins died on April 19, 1935.

An action was thereafter commenced in the Superior Court of the State of California, in and for the County of Los Angeles, by Mrs. Garnett V. Jenkins, the widow of Robert L. Jenkins, for herself, and as guardian of the minor child of herself and the deceased, Robert W. Jenkins, against the Southern Pacific Company, the Pullman Company, A. J. Kash, H. J. Hatch, Edward E. Myers and Fred M. Dolsen on the 27th day of September, 1935. [Tr. pp. 1, 10.] Thereafter, and on the 25th day of November, 1935, a first amended complaint was filed in the state court. [Tr. pp. 10, 20.] In said first amended complaint, the plaintiffs allege that they bring said action under and by virtue of Chapter II.

Section 51, Title 45 of the United States Code, and therein allege the substance of the Federal Employers' Liability Act. [Tr. p. 16, par. 14.] Thereafter, and on the 8th day of February, 1936, the plaintiffs filed their second amended complaint in the United States District Court by reason of the fact that the demurrer of appellant, H. J. Hatch had been filed and sustained to the first amended complaint. [Tr. p. 31.] It was later stipulated between the parties, that Mrs. Garnett V. Jenkins, administratrix of the estate of Robert L. Jenkins, deceased, was to be substituted as party plaintiff in the place and stead of Mrs. Garnett V. Jenkins and Robert W. Jenkins by Mrs. Garnett V. Jenkins, his guardian *ad litem*. The cause was then removed to the District Court of the United States, in and for the Southern District of California, Central Division, over the objections of the respondents. On December 28, 1936, the cause was dismissed as to defendants Southern Pacific Company and Fred M. Dolsen. On December 29, 1936, the cause was called for trial by the court, a jury having been waived by all parties. At that time, Hatch, Kash and the Pullman Company obtained leave of court to file supplemental answers in which they alleged that the controversy had been compromised and settled by reason of the fact that the plaintiffs had executed to the Southern Pacific Company and Fred M. Dolsen, a "Covenant Not To Sue" and that the action had been dismissed as to said defendants. The covenant and dismissal were offered in evidence. Also admitted were the "Petition For Confirma-

tion Of Administratrix' Covenant Not To Sue." No oral testimony was taken. On the basis of these documents, the court dismissed the action on the ground that the covenant entered into by the plaintiffs with the defendants, Southern Pacific Company and Fred M. Dolsen, released the joint tort feasors and such release inured to the benefit of all of the defendants.

Plaintiffs then appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court reversed the judgment of the United States District Court upon the sole ground that said District Court had no jurisdiction to hear and determine the cause.

The petition of the Pullman Company and Kash for a rehearing in the Circuit Court of Appeals was denied and thereafter a petition for a writ of certiorari to the United States Supreme Court was made and granted.

QUESTION INVOLVED.

The sole question before this Honorable Court is one of jurisdiction—that is to say, whether or not in an action brought under the Federal Employers' Liability Act and commenced in a state court, the defendants may remove to the Federal Court where the causes of action stated in the complaint were not severable.

ARGUMENT.

I.

The District Court Had No Jurisdiction to Hear and Determine This Cause.

The sole question involved before this Honorable Court is one of jurisdiction. There was nothing else decided in the Circuit Court of Appeals but the question of jurisdiction. There was no action by the Circuit Court of Appeals on any other question. This Honorable Court should not consider the merits or other questions which were not passed upon by the Circuit Court of Appeals until the Circuit Court of Appeals had rendered some decision on them. Therefore, appellants should not be permitted to argue a question which was not ruled upon or decided by Circuit Court of Appeals. It would therefore appear to respondents that this Honorable Court should consider only the question of jurisdiction. The appellants urge and insist that this Honorable Court pass upon the merits of the cause, notwithstanding the fact that the United States Circuit Court of Appeals did not consider or pass upon the merits of the case. The respondents certainly would be entitled to be apprised of the Circuit Court of Appeals' position on the question of the merits and should have an opportunity to argue said question. As it stands now, there is no decision on the merits on which either the appellants or respondents could argue.

The appellants seek to have this Honorable Court review the cause at bar on its merits on the authority of

Story Parchment Company v. Patterson Parchment Paper Company, 282 U. S. 555. This cause in question is not authority for appellants' view for several reasons—first the lower court considered and ruled on the question which came before this Honorable Court and, secondly, they do not seek to overthrow the judgment of the lower court, but sustain it. (*Story Parchment Company v. Patterson Parchment Paper Company*, 282 U. S. 555 at 560.) On appeal from the District Court to the Circuit Court of Appeals, the judgment was vacated and the case remanded to the trial court, with directions to enter judgment for respondents *upon the ground that the petitioner had not sustained the burden of proving that it suffered recoverable damages.* (*Story Parchment Company v. Patterson Parchment Paper Company*, 282 U. S. 555 at pp. 559-560.) In the case here before this Honorable Court, the Circuit Court of Appeals passed on one question and that was—the jurisdiction of the trial court and, therefore, that is the only question which can be raised before this Honorable Court. Respondents contend that when the first and second amended complaints were filed, the cause was not severable. Therefore, under said circumstances it was the duty of the court below to have remanded the cause to the state court. We find conclusive support in 28 U. S. C. A., section 80, which provides, in part, as follows:

> "If in any suit * * * removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district

court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * * the said district court shall proceed no further therein, but shall * * * remand it to the court from which it was removed." (*Jenkins v. Pullman Co.*, 96 Fed. (2d) 405 at 410.)

It is familiar law that the right of removal being statutory, an action commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. *Little York Gold Washing Co. v. Keyes*, 96 U. S. 199.

When the plaintiff's allegations show a cause of action under the Federal Employers' Liability Act, all other rights of action in the field of interstate commerce are excluded, (*New York Cen. R. R. Co. v. Winfield*, 244 U. S. 147) and the provisions of the Federal Act must control even though the cause is expressly based upon another ground.

San Antonio & E. P. R. R. Co. v. Schendel, 267 U. S. 287;

Moore v. Chesapeake & Ohio R. R. Co., 291 U. S. 205;

Grand Trunk Western Co. v. Lindsay, 233 U. S. 427.

It is true that on the problem of removal raised when a plaintiff pleads a non-removable cause under the Federal Employers' Liability Act for injuries received in interstate commerce and a removable cause under state law that the cases in the lower federal courts are in some confusion. The results have been supported on the one hand by arguing that the right to remove may not be defeated by joinder with a non-removable cause. On the other hand, it is commonly held that the state court has jurisdiction whenever the Act enters into a case.

In *Jones v. Southern R. R. Co.*, 236 Fed. 584, an action arising under the Act in which the District Court ordered the case remanded, the court said:

> "Cases brought in the state courts under this Employers' Liability Act are not removable. The amendment of April 5, 1910, (Comp. St. 1913, sec. 8662), *supra*, provides that:
>
> " 'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no (cause of action) arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'
>
> "There is a motion to remand on the ground that this case is brought under the Employers' Liability Act of Congress and consequently is not removable.
>
> "The question involved here has been before the District Court several times. The first case directly and squarely in point was the case of *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768. The opinion in this case is by District Judge Hand of the Southern District of New York . . .
>
> " 'Employers' Liability Act, sec. 6, provides that an action may be brought for injuries to, or death

of, employees within such act in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action, but that the jurisdiction of the courts of the United States shall be concurrent with those of the several states, and no case arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. Held that, *where an action under such statute is brought in a state court, it is not removable in spite of the diversity of citizenship of the parties.*'" (Italics ours.)

"The second case is decided by Judge Ray of the Northern District of New York. His ruling agrees with that of Judge Hand and after stating his reasons, which appear in the opinion, he granted a motion to remand. *Rice v. Boston M. R. R.*, 203 Fed. 580 . . .

"Another case was decided by Judge Ray in the Northern District of New York. *Peek v. Boston & M. R. R.*, 233 Fed. 448. In the decision in this later case, Judge Ray says:

"'If this complaint contains two causes of action, one under the Federal Employers' Liability Act and one under the state law, the Federal Employers' Liability Act controls, as both plaintiff and defendant were engaged in interstate commerce, and, Congress having legislated on the subject, the federal statute is paramount. The federal statute controls the liability and right of recovery—referring to several authorities, among them, *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.'"

II.

The Causes of Action Stated in the Complaint Were Not Severable.

It is the earnest contention of respondents that a cause of action under the Federal Employers' Liability Act was stated in the complaint. The fact that another independent cause of action was joined therewith did not defeat respondents' right to have the case tried in the state court. In this connection, the Federal Employers' Liability Act provides that "No case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

45 U. S. C. A., Sec. 56.

At the time that the order of removal was made by the state court there was on file the amended complaint, [Tr. pp. 10-20] which complaint clearly stated a cause of action under the Federal Employers' Liability Act. In an action in tort, the cause of action is whatever the plaintiff declares it to be in his pleading and when concurrent negligence is charged, the controversy is not separable. The plaintiffs' purpose in joining individual defendants, is immaterial in the absence of a charge of fraud at the time of the motion to remove.

Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131;

Chicago R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184.

A railroad corporation may be jointly sued with its employees when it is sought to make the corporation liable by reason of their negligence. Such a suit is not removable by the corporation as a separate controversy even though the amount involved is within the jurisdiction of the federal court and the requisite diversity of citizenship exists between the company and the plaintiff.

Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206.

It is, of course, not contended by the appellants that the plaintiffs here could not have proceeded either jointly or severally against those liable for the injury. There is nothing in the federal removal statute which converts such an action, that is, one in which the plaintiff may proceed either jointly or severally, into a separable controversy for the purposes of removal, because of the presence of a non-resident defendant properly joined therein under the law of the state wherein the defendant company is conducting operations.

Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Bohon, 200 U. S. 211.

It must be borne in mind that the amended complaint unquestionably stated a cause of action under the Federal Employers' Liability Act. Assuming for the purpose of discussion, that appellants are correct in stating that the amended complaint was filed subsequent to the order of removal, there is, nevertheless ample authority to sustain the proposition that the subsequent amendment to the complaint related back to the time of the original complaint. For example, in *New York Central Ry. Co. v. Kinney*, 260 U. S. 340, it was held that where a com-

plaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, an amendment alleging that the parties at the time of the injury were engaged in interstate commerce does not introduce a new cause of action.

See also,

Chicago, R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184,

in which the complaint was amended *after* the motion to remove had been made.

In *Missouri, Kan. & Tex. Ry. Co. v. Wulff*, 226 U. S. 570, the court allowed an amendment alleging that plaintiff sued in the capacity of administrator and held that such amendment related back to the time of the original complaint.

This case is likewise important for the light which it sheds on the argument of appellants that the action should have been brought by the administratrix in the first instance. As a matter of fact, the record [Tr. p. 27] shows that a stipulation substituting Mrs. Jenkins as administratrix was accepted by all parties, though it was disregarded by them subsequently. However, that may be, in *Missouri, Kan. & Tex. Ry. Co. v. Wulff*, 226 U. S. 570, a similar situation was presented to the court. The court said:

> "The argument for reversal rests wholly upon the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition

failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. Second

Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

"It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co. v. Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us: an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within section 954, Rev. Stat."

Under these circumstances, respondents earnestly contend that it sufficiently appeared that the cause of action was not severable when the second amended complaint was filed. It was, therefore, the duty of the District Court to remand the cause back to the state court because it appeared after the suit had been removed that there was no substantial dispute properly within the jurisdiction of the District Court.

28 U. S. C. A., 80.

Nor did the respondents waive any right to remand the cause back to the state court because if, as a matter of fact, the District Court had no jurisdiction to hear and determine the case, plaintiffs could not confer jurisdiction upon said court by any waiver. The court of its own motion should have remanded the cause to the state court. *McNutt v. General Motors etc. Corp.*, 298 U. S. 178; *Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413.

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals is correct and that the District Court had no jurisdiction to hear and determine the cause since the causes of action were not severable and fell within the provisions of the Federal Employers' Liability Act requiring the state court to entertain jurisdiction.

If this Honorable Court believes that respondents should argue the merits of the case involving the covenant not to sue as argued by appellants, in a printed brief, in addition to what we have hereinabove said, then we request the Honorable Court to grant us a reasonable time to have an additional brief printed on said question.

Respectfully submitted,

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L. H. PHILLIPS,
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807 Van Nuys Building,
Los Angeles, California.

Due service of the within Brief is hereby acknowledged this.....day of November, A. D., 1938.

_____

_____

Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1938.

The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, Petitioners,
vs.
Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 16, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question is whether petitioner, the Pullman Company, was entitled to remove this cause to the federal court. The Circuit Court of Appeals, reversing the District Court, ordered remand (96 F. (2d) 405) and because of conflict in the ground of its ruling with decisions of this Court, we granted certiorari. October 10, 1938.

Respondent, Mrs. Jenkins, and her son Robert W. Jenkins, by Mrs. Jenkins as guardian *ad litem*, brought this action on September 27, 1935, in the Superior Court for Los Angeles County, California, to recover damages for injuries causing the death of her husband. He was employed by the Southern Pacific Company as conductor of a train running from Los Angeles to San Francisco. His injuries were due to a blow struck by A. J. Kash, who was being removed from the train by police officers called to assist the conductor in ejecting Kash because of his disorderly conduct. The suit was brought against the Southern Pacific Company, the Pullman Company, Kash, Hatch, the Pullman conductor, John Doe One, described as employed by the Pullman Company as porter, and John Doe Two, described as employed by the Southern Pacific Company as gate tender at the passenger depot at Los Angeles.

The complaint alleged two causes of action, one against all the defendants, the other against Kash alone. The plaintiffs and defendant Kash were stated to be residents of California. The Southern Pacific Company was described as a Kentucky corpora-

tion and the Pullman Company as an Illinois corporation. The residences of the defendants Hatch and John Doe One and John Doe Two were not set forth.

On November 20, 1935, the Pullman Company, as a citizen and resident of Illinois, insisting that the controversy as to it was a separable one, filed its petition for removal to the federal court, with bond; and on November 25, 1935, the petition and bond were approved and removal was ordered. On the day on which that order was entered, an amended complaint was filed in the state court which contained the allegation that the action was brought against the Southern Pacific Company under the Federal Employers' Liability Act. 45 U. S. C. 51. On December 27, 1935, Mrs. Jenkins as administratrix of the estate of the decedent was substituted as plaintiff. On January 17, 1936, the defendant Hatch demurred to the amended complaint upon the ground that it stated no cause of action against him, and on January 29, 1936, the demurrer was sustained.

On January 22, 1936, the plaintiffs moved to remand, stating that Edward E. Meyers, the Pullman porter, sued as John Doe One, had been served with process on January 14, 1936, and that he and the defendant Hatch were residents and citizens of California, and that the action as against them and the Pullman Company was not a separable controversy. Pending this motion, on February 5, 1936, the plaintiffs filed in the federal court a second amended complaint identifying Meyers as the Pullman porter and Fred M. Dolsen as John Doe Two, described as the Southern Pacific gate tender. This amended complaint repeated the allegation that the Southern Pacific was sued under the Federal Employers' Liability Act. On February 19, 1936, the court denied the motion to remand.

On December 28, 1936, the action was dismissed as against the Southern Pacific and Dolsen as the result of a compromise. Supplemental answers were then filed by the remaining defendants respectively claiming release by reason of the agreement with the Southern Pacific. The District Court sustained this defense and entered judgment dismissing the complaint.

On appeal, the Circuit Court of Appeals, passing the other questions, held that if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed and hence that the District Court erred in denying the motion to remand. 86

F. (2d) p. 410. This ruling was placed upon an erroneous ground. The second amended complaint should not have been considered in determining the right to remove, which in a case like the present one was to be determined according to the plaintiffs' pleading at the time of the petition for removal. *Barney* v. *Latham*, 103 U. S. 205, 213-216; *Graves* v. *Corbin*, 132 U. S. 571, 585; *Louisville & Nashville R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Salem Company* v. *Manufacturers' Company*, 264 U. S. 182, 189, 190; *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 294, 295.

The question then is whether the original complaint set forth a separable controversy between the plaintiffs and the Pullman Company, that is, a controversy "which is wholly between citizens of different States, and which can be fully determined as between them". 28 U. S. C. 71. If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal. *Barney* v. *Latham*, *supra*; *Nichols* v. *Chesapeake & Ohio R. Co.*, 195 Fed. 913, 915, 916; *Stewart* v. *Nebraska Tire & Rubber Co.*, 39 F. (2d) 309, 311; *Des Moines Elevator Co.* v. *Underwriters Grain Association*, 63 F. (2d) 103, 105; *Culp* v. *Baldwin*, 87 F. (2d) 679, 680-682.

This is so whether the action sounds in contract or in tort. The question is determined by the plaintiff's pleading. Thus if defendants are charged with negligence, but the charge against the non-resident defendant is based on different and non-concurrent acts of negligence and a cause of action which is joint in character is not alleged, a separable controversy is presented. See *Culp* v. *Baldwin*, *supra*. Where, in the absence of clear proof of bad faith in the joinder, concurrent acts of negligence on the part of the defendants sued as joint tort-feasors are sufficiently alleged, a separable controversy is not presented and the fact that the defendants might have been sued separately affords no ground for removal. This rule is applied where a non-resident employer and its resident employee, whose negligence caused the injury, are sued jointly. *Chesapeake & Ohio R. Co.* v. *Dixon*, 179 U. S. 131, 139; *Alabama Southern R. Co.* v. *Thompson*, 200 U. S. 206, 212, 213, 220; *Chicago, R. I. & P. R. Co.* v. *Dowell*, 229 U. S. 102, 111-113; *Hoy* v. *May Company*, 271 U. S. 318, 321, 322; *Watson* v. *Chevrolet Motor Co.*, 68 F. (2d) 686, 689; *Harrelson* v. *Missouri Pacific Transportation Co.*, 87 F. (2d) 176, 177.

In the instant case, the original complaint did not charge any negligence or wrongful conduct in ejecting Kash from the train. On the contrary, it was alleged that he was intoxicated and was acting in an offensive, threatening and quarrelsome manner in which he persisted despite remonstrance. There was clearly a separable controversy with respect to Kash. He was sued for his unlawful assault upon the conductor.

The negligence charged against the Southern Pacific Company and its gate tender was in the action of the latter in permitting Kash to enter the station and go through the gates to board the train without displaying his ticket and while drunk and disorderly. The negligence charged against the Pullman Company and its porter was alleged to consist in the action of the porter in permitting Kash to board the Pullman sleeper. No facts were alleged upon which liability of the Pullman Company and its employee could be predicated upon the negligence of the Southern Pacific Company and its gate tender. It was not shown that either the Pullman Company or the Southern Pacific Company was liable for the acts of the other or that they joined in the commission of any wrong. With respect to these companies in relation to each other, the cases above cited, so far as they hold that a separable controversy is not presented when master and servant are joined because of concurrent negligence, are not in point.

Nor was any negligence or wrongful act alleged on the part of the Pullman conductor.

The question, however, remains as to the effect of the joinder of the Pullman porter. If the porter had been sued in his proper name, instead of John Doe, had been described as a citizen of California, and had been served with process prior to the petition for removal, there could be no question that the Pullman Company would not have been entitled to remove. *Chesapeake & Ohio R. Co.* v. *Dixon, supra; Alabama Southern R. Co.* v. *Thompson, supra; Hay* v. *May Company, supra.*

We think that the fact that the Pullman porter was sued by a fictitious name did not justify removal. His relation to the Pullman Company and his negligence as its servant were fully alleged. See *Grosso* v. *Butte Electric R. Co.*, 217 Fed. 422. Nor does the fact that the residence of the porter was not set forth justify disregarding him. It was incumbent upon the Pullman Company to show that it had a separable controversy which was wholly between citizens of different States. As in determining whether there was

such a separable controversy with respect to the Pullman Company its porter could not be ignored, the Company was bound to show that he was a non-resident in order to justify removal.

At the time of the petition for removal the Pullman porter had not yet been served with process. Where there is a non-separable controversy with respect to several non-resident defendants, one of them may remove the cause, although the other defendants have not been served with process and have not appeared. *Tremper* v. *Schwabacher*, 84 Fed. 413, 416; *Bowles* v. *H. J. Heinz Co.*, 188 Fed. 937; *Hunt* v. *Pearce*, 271 Fed. 498; 284 Fed. 321, 323, 324; *Community Building Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678; *Trower* v. *Stonebraker-Zea Co.*, 17 F. Supp. 687, 690; *Kelly* v. *Alabama-Quenelda Co.*, 34 F. (2d) 790, 791. In such a case there is diversity of citizenship, and the reason for the rule is stated to be that the defendant not served may never be served, or may be served after the time has expired for the defendant who has been served to apply for a removal, and unless the latter can make an effective application alone, his right to removal may be lost. *Hunt* v. *Pearce*, 284 Fed. p. 324. But the rule is otherwise where a non-separable controversy involves a resident defendant. In that case the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant. *Patchin* v. *Hunter*, 38 Fed. 51, 53; *Armstrong* v. *Kansas City Southern R. Co.*, 192 Fed. 608, 615; *Hunt* v. *Pearce*, 271 Fed. p. 502; *Del Fungo Giera* v. *Rockland Light & Power Co.*, 46 F. (2d) 552, 554; *Hane* v. *Mid-Continent Corporation*, 47 F. (2d) 244, 246, 247. It may be said that the non-resident defendant may be prejudiced because his co-defendant may not be served. On the other hand there is no diversity of citizenship, and the controversy being a non-separable one, the non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove. *Wecker* v. *National Enameling Co.*, 204 U. S. 176, 185, 186; *Chesapeake & Ohio R. Co.* v. *Cockrell*, 232 U. S. 146, 152; *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 97; *Clancy* v. *Brown*, 71 F. (2d) 110, 112, 113.

In the instant case there was no charge that the joinder was fraudulent. On the motion to remand it appeared that the Pullman porter, identified as Meyers, was a resident of California and had then been served with process.

We conclude that the District Court erred in denying the motion to remand and that the judgment of the Circuit Court of Appeals should be affirmed.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1938.

The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, Petitioners,
vs.
Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 16, 1939.]

Mr. Justice Black, concurring.

I agree that it was incumbent upon the Pullman Company, seeking removal, to show that it was sued in a controversy "wholly between citizens of different States;"[1] that the Company failed to meet this burden; that plaintiff's joining the Pullman Company with a Pullman porter designated by a fictitious name did not relieve the Company of its statutory burden; that consequently the District Court erred in denying a motion to remand, and that the judgment of the Circuit Court of Appeals, reversing the District Court's refusal to remand, should be affirmed. To certain portions of the opinion, which this affirmance does not require, I cannot agree.

First. The original complaint filed in the State court indicated plaintiff's intention to rest its case against the Southern Pacific Company upon the Federal Employers' Liability Act, under which suits brought in State courts are not removable to Federal courts.[2] The pleadings did not disclose that the suit was based on the Federal Act as clearly as good pleading requires, and the complaint was doubtless subject to special demurrer because of its generality. But the mere fact that a complaint based on the Federal Act is demurrable does not make it subject to removal. In addition, both an amendment filed in the State court before the order of removal (but after the petition for removal), and a second amendment filed after removal, served to make the original complaint more precise and made clear the original purpose of

[1] c. 3, Sec. 71, 28 U. S. C.
[2] c. 2, Sec. 51, § 56, 45 U. S. C.

claiming under the Federal Employers' Liability Act without changing the original cause of action. "It is true that the declaration was amended after the petition to remove . . . , but the amendment if not annecessary merely made the original cause of action more precise. On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the [petition for removal was ruled on] . . . We are not to decide whether a flaw could be picked in the declaration on special demurrer."[3]

Both from the original complaint and from its amendments it seems clear to me that plaintiff sought relief under the Federal Employers' Liability Act and that the ruling of the Court of Appeals on that ground was proper.

Second. The disposition of this case on the ground set out in the opinion does not require the statement that "If, as to the nonresident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal." Nor do I agree that this is a correct construction of the removal statute. The statement is rested on the case of *Barney* v. *Latham*, 103 U. S. 205, and opinions from two Circuit Courts of Appeals.[4] However, this Court later refused to accept the *Latham* case as authority for the proposition that the statutory right of removal "takes no account of . . . what may be the rules of practice, whether common law or statutory, of the State in which the action may be pending;" instead, it held exactly the opposite. *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206, (see argument of counsel, page 209). And in *Cincinnati and Texas Pac. Ry. Co.* v. *Bohon*, 200 U. S. 221, 225, 226 (considered and decided with the *Thompson* case), the Court stated:

"While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that

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[3] Chicago, R. I. & Pac. Ry. v. Schwyhart, 227 U. S. 184, 194.

[4] Nichols v. Chesapeake & Ohio Ry. Co. (CCA 6th, decided 1912), 195 Fed. 913; Stewart v. Nebraska Tire & Rubber Co. (CCA 8th, decided 1930), 39 Fed. (2d) 309; Des Moines Elevator & Grain Co. v. Underwriters' G. Ass'n. (CCA 8th, decided 1933), 63 Fed. (2d) 103; Culp v. Baldwin (CCA 8th, decided 1937), 87 Fed. (2d) 679 (but see 679-80).

if the action was properly joint in the form in which it was being prosecuted it could not be removed as a separable controversy under the act of Congress. We have under consideration an action for tort which by the constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. (See cases cited in *Alabama Great Southern Railway Co.* v. *Thompson, supra.*) A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

It was thus broadly held that there can be no other or separable controversy, if a plaintiff properly elects under State practice to sue defendants jointly. Even a separate defense, which may defeat a joint recovery, cannot create a separable controversy when the plaintiff has a right to make his cause of action joint.[5]

In cases which have involved the right of removal since the *Latham* case, this Court has repeatedly held that the "joint liability of the defendants [one of whom is a non-resident] under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the State before which the question could come."[6]

Only two Circuit Courts of Appeals have held that causes of action properly joined under State practice may nevertheless be separable for purposes of removal; other Circuits have followed

[5] Pirie v. Tvedt, 115 U. S. 41; Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 97; Chi., B. & Q Ry. Co. v. Willard, 220 U. S. 413.

[6] Chicago, R. I. & Pac. Ry. v. Schwyhart, *supra*, at 193 (decided 1913); Southern Ry. Co. v. Miller, 217 U. S. 209, 215, 216 (decided 1910); "The Supreme Court of the State decided that the petition stated a cause of action against Drake and the railway company, and whether it did, we said in *Chicago, Rock Island & Pacific Ry.* v. *Schwyhart*, 227 U. S. 184, was a matter of state law." Chi., Rock Island Ry. v. Whiteaker, 239 U. S. 421, 424 (decided 1915); Chi. & Alton R. R. Co. v. McWhirt, 243 U. S. 422 (decided 1917).

the decisions of this Court.[7] Cases from the two Circuits are relied upon to support the language in the opinion of the Court to which I cannot agree.[8] However, the cases relied upon from one of these two Circuits no longer appear to represent the rule even in that Circuit.[9] And the lone case in the other of the two Circuits was contrary to and decided before the most recent decisions of this Court on the subject.[10]

Third. It is, of course, true that where governing State law characterizes actionable negligence of a local and a non-resident defendant as "concurrent negligence," there can be no right of removal. However, this is but one application of the rule governing removals under which we look to State law to determine the propriety of joining two or more defendants in a single suit.[11] The opinion in the *Thompson* case, *supra*, was expressly designed to resolve the "conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly caused the injury." (at pp. 213, 214). The question

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[7] In Norwalk v. Air-Way Electric Appliance Corp., 87 Fed. (2d) 317, 319, the Circuit Court of Appeals for the Second Circuit held that "whether a separable controversy exists for the purpose of removal is determined by state law," citing the *Bohon* case and the *McWhirt* case, *supra*. To the same effect are, Johnson v. Noble, 64 Fed. (2d) 396, 398, Padgett v. Chi., R. I. & Pac. Ry. Co., 54 Fed. (2d) 576, 577, and Centerville State Bank v. Nat'l. Surety Co., 37 Fed. (2d) 338 (CCA 10th); Gulf Refining Co. v. Morgan, 61 Fed. (2d) 80, 81 (CCA 4th); see Breymann v. Penn., O. & D. R. Co., 38 Fed. (2d) 299 (CCA 6th), opinion of Hutcheson, Circuit Judge, in Lake v. Texas News Co., 51 Fed. (2d) 862, 863 (S. D. Texas) and City of Waco, Tex. v. U. S. F. & G. Co., 76 F. (2d) 470, 471 (CCA 5th).

[8] See note 4, *supra*.

[9] Other cases in the Eighth Circuit throw some degree of doubt on the Stewart and Grain Co. cases, *supra*, and indicate a disposition to determine whether liability of a defendant under allegations of a complaint is joint or severable by reference to State law. See, Harrelson v. Mo. Pac. Transportation Co., 87 Fed. (2d) 176, 178; Huffman v. Baldwin, 82 Fed. (2d) 5, 8; Watson v. Chevrolet Motor Co. of St. Louis, 68 Fed. (2d) 686, 688, 689. After the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the Circuit Court of Appeals for the Eighth Circuit seemingly was of opinion (1938) that the question of "joint liability and of the bearing thereof on the question of removability" must be determined by the law of the State. Ervin v. Texas Co., 97 Fed. (2d) 806, 809.

[10] The Nichols case, *supra*, in the Sixth Circuit, was decided in 1912; the Schwyhart case, the Whiteaker case, and the McWhirt case, in this Court, were decided in 1913, 1915, and 1917, respectively (see note 6).

[11] See, Chesapeake & Ohio R. Co. v. Dixon, 179 U. S. 131, 140; Alabama Great So. Ry. Co. v. Thompson, *supra*, 220; Chi., R. I. & Pac. Ry. v. Dowell, 229 U. S. 102, 112, 113.

mitted for decision in that case was (pp. 212, 213): "May a railroad corporation be jointly sued with two of its servants . . . though . . . not charged with any concurrent act of negligence?" This Court gave an affirmative answer.

The principle has been well stated by the Circuit Court of Appeals of the Second Circuit: . .

"Appellees contend that removal is prevented only where a master and servant are charged with concurrent negligence. The rule is settled otherwise. In Alabama Great So. Ry. Co. *v.* Thompson, supra, and Cincinnati, N. O. & Texas Pac. Ry. *v.* Bohon, supra, the master was alleged to be liable on the doctrine of respondeat superior. It is immaterial that the liability of the master and that of the servant proceed on different grounds; even more distinct were the bases of liability of the lessee and lessor railroad companies in Chicago, B. & Q. Ry. Co. *v.* Willard, . . . [220 U. S. 413] where the lessor was held on its obligation to the public of which it could not be relieved by virtue of a lease. . . . Nothing in Hay *v.* May Department Stores Co., 271 U. S. 318, . . . supports the claim that the rule of nonremovability is limited to instances of concurrent negligence."[12]

The Constitution authorizes Congress to fix the jurisdiction of Federal District Courts. The constitutional division of powers between the States and the National government makes it necessary that the jurisdictional policy declared by Congress be scrupulously observed. This is especially so in view of the fact that after removal of a cause from a State court by reason of diversity of citizenship, the Federal court must proceed under State law and practice. Questions of State constitutional, statutory and general law, which have not been clearly and finally determined by the State's highest court, may arise in the Federal court. The State court need not thereafter, in other litigation, follow the Federal court's decision on such questions. However, cases for which Congress has not authorized removal from a State court can be appealed to the State's highest judicial tribunal, thus giving each litigant a final determination of his rights under State laws by the body vested with final authority to interpret those laws. Rights and privileges under the Federal Constitution and laws, which may be involved in such litigation in a State court, can still be protected by appeal to this Court.

[12] Norwalk *v.* Air-Way Electric Appliance Corporation, *supra*, 319.

The statutory privilege of removal should be protected. But I do not believe that judicial construction should expand the statutory privilege beyond limits intended by the statute and properly recognized by this Court in previous decisions. Particularly, I think it unwise to indicate this step in a case in which decision and judgment do not require discussion of the question.